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United States

ASSOCIATION OF CALIFORNIA WATER AGENCIES; ANTELOPE VALLEY-EAST KERN WATER AGENCY; CASTAIC LAKE WATER AGENCY; COACHELLA VALLEY COUNTY WATER DISTRICT; CRESTLINE-LAKE ARROWHEAD WATER AGENCY; DESERT WATER AGENCY; KERN COUNTY WATER AGENCY; THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA; MOJAVE WATER AGENCY; SAN BERNARDINO VALLEY MUNICIPAL WATER DISTRICT; and SAN GABRIEL VALLEY MUNICIPAL WATER DISTRICT,

Petitioners,

vs.

THE UNITED STATES OF AMERICA; THE DEPARTMENT OF THE INTERIOR; and JAMES G. WATT, SECRETARY OF THE DEPARTMENT OF THE INTERIOR,

Respondents.

ENVIRONMENTAL DEFENSE FUND; SIERRA CLUB; CALIFORNIA TROUT; and SAVE THE AMERICAN RIVER ASSOCIATION,

Intervenors.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

I

Can the United States Secretary of the Interior add a river to the National Wild and Scenic Rivers System under the provisions of the federal Wild and Scenic Rivers Act by:

A. Overriding a contemporaneous state court ruling that state law requires further State Legislative action before the state will be committed to permanently administer the river in the manner required by the Federal Act?

B. Determining that the State Legislature has adequately designated a river as wild, scenic or recreational, when the State Legislature has expressly ordered further studies of the need to remove such designation and construct water supply and flood control facilities prohibited by the Federal Act?

II

Did the Court of Appeals err in:

A. Dismissing as harmless "trivial error" the violation of federal regulations by "lame duck" federal officials through the use of a false affidavit when, absent that violation, the outgoing Secretary of the Interior would have been unable to deprive California of control over its own waters?

B. Failing to independently review the Secretary of the Interior's interpretation of applicable state and federal law, including his rejection of a contemporaneous state court ruling?

C. Refusing to allow trial on disputed factual issues on the Third Cause of Action, after the district court had denied petitioners' motion for summary judgment on that cause on the basis that it required determination of triable issues of material fact?

PARTIES TO THE ACTION

All current parties to this action appear in the caption of this case. The Ninth Circuit Court of Appeals consolidated this case with two related cases, both of which bear the caption "*County of Del Norte, et al. v. United States of America, et al./Environmental Defense Fund, et al.*" (hereinafter sometimes referred to as the "North Coast interests' " cases), Ninth Circuit Court of Appeals docket numbers 83-1761 and 83-2018. If, as petitioners expect, the North Coast interests also petition this Court for certiorari, the parties shown in the caption of that petition will also have relevance to this case.

The State of California was an intervenor in the district court action below, but did not pursue an appeal to the Ninth Circuit Court of Appeals.

TABLE OF CONTENTS

	Page
Questions presented	i
Parties to the action	ii
Citations to opinions below	1
Jurisdiction	1
Constitutional, statutory, and regulatory provisions involved	1
Basis for jurisdiction below	2
Statement of the case	2
Argument in support of petition for writ of certiorari	11
I	
This case presents important federal questions that deserve the attention of this court	11
II	
The Secretary of the Interior erred as a matter of law in adding the affected rivers to the national system	13
A. The Secretary exceeded his authority when he destroyed the California Legislature's expressly reserved option to develop the Eel River to meet the needs of California's people	14
B. The Secretary exceeded his authority when he overrode a state court's interpretation of state law	16
C. The Secretary's approval effectively violated the state's constitutional delegation of powers	18
III	
The Court of Appeals did not fulfill its duty to independently review the Secretary's interpretations of law	21

Table of Contents

Page

IV

The Ninth Circuit's decision establishes a disturbing precedent for allowing outgoing administrations free license to politicize agency determinations 26

V

The Court of Appeals improperly deprived petitioners of their right to trial on the adequacy of the final environmental impact statement 27

Conclusion 30

TABLE OF AUTHORITIES CITED

Cases

	Page
Baber v. Schweiker (D.C. 1982) 539 F.Supp. 993	25
Churchill v. F/V Fjord, Ninth Circuit Court of Appeals docket number 82-3644, (August 7, 1984)	24
Citizens to Preserve Overton Park, Inc. v. Volpe (1971) 401 U.S. 402	22, 25
County of Del Norte, et al. v. Cecil D. Andrus, et al., N.D.-Cal., Docket No. C-80-3964-WAI, (October 20, 1980.)	7
County of Del Norte, et al. v. Cecil D. Andrus, et al., N.D.-Cal., Docket No. C-81-0035-SAW, (January 6, 1981.)	7
County of Del Norte, et al. v. Edmund G. Brown, Jr., et al., County of Sacramento, Superior Court No. 292019 (filed October 20, 1980.)	6
Fidelity Union Trust Co. v. Field (1940) 311 U.S. 169	23, 24
Fountain v. Filson (1949) 336 U.S. 681	29
Grand Canyon Dories v. Idaho Outfitters and Guides (9th Cir. 1983) 709 F.2d 1250	24
Highland Farms Dairy v. Agnew (1936) 300 U.S. 608	20, 21
ICC v. Clyde S.S. Co., 181 U.S. 29, 21 S. Ct. 512 (1901), 45 L. Ed. 729	25
Kasey v. Richardson (4th Cir. 1972) 462 F.2d 757	25
Mullaney v. Wilbur (1975) 421 U.S. 684	23
Nat. Assn. of Greeting Card Pubs. v. USPS (1983) U.S. (77 L. Ed. 2d 195)	25
NLRB v. Ent. Ass'n. of Steam, Hot Water, etc. (1977) 429 U.S. 507	25
Roberts v. Elaine Powers Figure Salons, Inc. (9th Cir. 1983) 708 F.2d 1476	24

Table of Authorities Cited

Cases

	Page
State ex rel. Edwards v. Heimann (9th Cir. 1980) 633 F.2d 886	24, 25
United States v. Nixon (1974) 418 U.S. 683	27
U.S. v. Coleman (1968) 390 U.S. 599	11

Constitutions

California Constitution:	
Article III, Section 3	2, 19
Article IV, Section 1	2
Article V, Section 1	2, 20
United States Constitution, Tenth Amendment	2, 20

Statutes

5 U.S.C.:	
§ 551 et seq.	24
§ 706	2, 25
§ 706(2)	16
§ 706(2)(A)	18
§ 706(2)(C)	18
16 U.S.C.:	
§ 1271	2, 4, 15, 23
§ 1271 et seq.	13
§ 1273	2, 4
§ 1273(1)	3
§ 1273(2)	3
§ 1273(a)	21
§ 1273(a)(1)	13
§ 1273(a)(ii)	3, 4, 11, 12, 16, 22, 23, 25, 30
§ 1278	2, 4
§ 1278(a)	15

Table of Authorities Cited

Statutes

	Page
§ 1281	2
§ 1286	2, 4
§ 1286(d)	15
28 U.S.C.:	
§ 1254(1)	1
§ 1331	2
§ 1361	2
§ 1651	2
§ 2101(c)	1
42 U.S.C.:	
§ 4321 et seq.	27
§ 4332	2
California Public Resources Code:	
§ 5093.50 et seq.	2, 5, 14, 23
§ 5093.52	17
§ 5093.53	17
§ 5093.54(d)	13, 14, 15, 19
§ 5093.55	15
§ 5093.56	13, 14, 19
§ 5093.57	13, 14, 19
§ 5093.58	5, 17, 19
§ 5093.59	17
§ 5093.60	17
California Water Code	
§ 10004	2, 12
§ 12390	12
§ 12938	2
Cal. Stats., c. 1481, § 19	5

Table of Authorities Cited

Statutes

Page

Regulations

40 C.F.R.:

§ 1502.14 2
§ 1502.14 et seq. 27
§ 1502.16 2
§ 1502.25 2
§ 1503.2 2
§ 1503.4 2
§ 1506.9 ..... 2, 8, 9, 12
§ 1506.10 ..... 2, 8, 9, 12, 26

Department of the Interior Procedures

45 Fed. Reg.:

27541, April 23, 1980 ..... 2, 27
27549 ..... 2, 27

46 Fed. Reg.:

7484-01, January 23, 1981 1

Rules

United States Supreme Court Rules:

Rule 17 1
Rule 20.2 1
Rule 20.4 1

Other Authorities

6 Moore's Federal Practice (2nd ed.), ¶ 56.12, p.56-331 29

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CITATIONS TO OPINIONS BELOW

The administrative agency's action is commemorated by a "Notice of Approval for Inclusion . . ." which was published in the *Federal Register* at 46 Fed.Reg. 7484-01, January 23, 1981. The text of the notice is reproduced in the Appendix to this Petition at App. 82-86.

The opinion of the district court was not officially published, but it is reproduced in the Appendix to this Petition at App. 21-34 (Memorandum of Decision) and App. 35-37 (Judgment). The district court's Memorandum of Decision is unofficially published at 19 ERC 1138.

The May 11, 1984 opinion of the Ninth Circuit Court of Appeals is reported at 732 F.2d 1462, but its July 5, 1984 order denying rehearing has not been published. The Ninth Circuit Court of Appeals' opinion and order denying rehearing are reproduced in the Appendix to this Petition at App. 1-10 (Opinion) and App. 11 (Order).

JURISDICTION

The United States Court of Appeals for the Ninth Circuit issued and entered its opinion on May 11, 1984, and denied the petition for rehearing on July 5, 1984. Pursuant to Rules of the Supreme Court of the United States, Rules 20.2 and 20.4, and 28 U.S. Code, Section 2101, subdivision (c), a petition for writ of certiorari is therefore due by October 3, 1984. Petitioners invoke this Court's jurisdiction under 28 U.S. Code, Section 1254, subdivision (1), and Rules of the Supreme Court of the United States, Rule 17.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

This case involves the interpretation of the following constitutional provisions, statutes, and regulations, the full texts of which are set forth in the Appendix to this Petition as indicated:

U.S. Constitution, Amendment X (App. 87)
5 U.S. Code § 706 (App. 87)
16 U.S. Code §§ 1271, 1273, 1278, 1281, and 1286 (App. 88-97)
42 U.S. Code § 4332 (App. 97-100)
California Constitution, Article III, § 3; Article IV, § 1; and Article V, § 1 (App. 100)
California Public Resources Code § 5093.50 *et seq.*, as enacted by Cal. Stats. 1972, c. 1259 (including 1973 amendment by Cal. Stats. c. 499.) (App. 104-110)
California Public Resources Code § 5093.50 *et seq.*, as amended by Cal. Stats. 1982, c. 1481 (App. 111-139)
California Water Code §§ 10004, 12938 (App. 101-103)
40 C.F.R. §§ 1502.14, 1502.16, 1502.25, 1503.2 and 1503.4 (App. 140-143)
40 C.F.R. §§ 1506.9, 1506.10 (App. 143-145)
Department of the Interior Procedures (45 Fed. Reg. 27541, April 23, 1980 (App. 146-181)

BASIS FOR JURISDICTION BELOW

The jurisdiction of the district court was invoked pursuant to 28 U.S. Code, Sections 1331, 1361, and 1651.

STATEMENT OF THE CASE

This case arises out of an action taken by the outgoing United States Secretary of the Interior under the federal Wild and Scenic Rivers Act, 16 U.S.C. § 1271, *et seq.*, (hereinafter the "Federal Act"). On January 19, 1981, the eve of his departure from office, Cecil D. Andrus signed a document by which he purported to place some 2,400 miles of five California rivers[1] in the National Wild and Scenic Rivers System (hereinafter the "National System"). He acted in response to a July 18, 1980 request from then-Governor of California Edmund G. Brown, Jr., cooperating

[1]The Eel, Smith, Trinity, and Klamath Rivers (the "North Coast" rivers), and the American River. The American River is located in a completely different area of the state from the North Coast, and its included length totalled only 23 miles. (See. App. 82-86.)

in an accelerated process that was admittedly designed to ensure that Secretary Andrus, rather than the Secretary appointed by the new administration, would rule on the request.[2]

Secretary Andrus acted in this cursory fashion in the face of the fact that inclusion of the rivers in the National System would shift more than thirty percent of California's natural water supply from state to federal control.[3] In addition, his decision conflicted directly with a contemporaneous interpretation of relevant California law rendered by the appropriate California court in an ancillary judicial proceeding.

The Secretary based his decision on Section 2(a)(ii) of the Federal Act, 16 U.S.C. § 1273, subd. (a)(ii).[4] That sec-

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[2]Appendix S hereto (7/21/80 memorandum from Department of the Interior staff to Secretary Andrus):

> The state is seeking a final decision on its petition prior to Secretary Andrus' departure. It believes that the climate for positive response exists now and therefore wants to have action taken prior to any change of personalities.

(App. 199.)

[3]That flow represents about 20 million acre-feet of water annually, 10 times greater than the firm water supply presently available to California's multi-billion dollar State Water Project (App. 44.)

[4]When Congress enacted the Federal Act in 1968 (Pub. L. 90-542, October 2, 1968, 82 Stat. 906), 16 U.S. Code § 1273 was Section 2 of Public Law 90-542. Subsequent amendments, not material here, have since been made to 16 U.S. Code § 1273, by Section 1 of Public Law 94-407, and by Section 761 of Public Law 95-625. For convenience, 16 U.S. Code § 1273, subdivision (a)(ii) will be referred to throughout this Petition as either "Section 2(a)(ii) of the Federal Act" or "16 U.S. Code § 1273, subd. (a)(ii)." That measure provides:

> The national wild and scenic rivers system shall comprise rivers (i) that are authorized for inclusion therein by Act of Congress, or (ii) that are designated as wild, scenic or recreational rivers by or pursuant to an act of the legislature of the State or States through which they flow, that are to be per-

tion allows the Secretary to add a river to the National System upon a state governor's request if: (1) the state's legislature has designated the river as wild, scenic or recreational; and (2) the state agrees to permanently manage the river for those purposes under federal criteria that prohibit, among other things, development of the river for water supply. 16 U.S.C. §§ 1273, 1278, 1286.

Although California's Legislature had previously designated the rivers as wild, scenic or recreational under the California Wild and Scenic Rivers Act (hereinafter the

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manently administered as wild, scenic or recreational rivers by an agency or political subdivision of the State or States concerned that are found by the Secretary of the Interior, upon application of the Governor of the State or the Governors of the States concerned, or a person or persons thereunto duly appointed by him or them, to meet the criteria established in this chapter and such criteria supplementary thereto as he may prescribe, and that are approved by him for inclusion in the system, including, upon application of the Governor of the State concerned, the Allagash Wilderness Waterway, Maine; that segment of the Wolf River, Wisconsin, which flows through Langlade County; and that segment of the New River in North Carolina extending from its confluence with Dog Creek downstream approximately 26.5 miles to the Virginia State line. Upon receipt of an application under clause (ii) of this subsection, the Secretary shall notify the Federal Energy Regulatory Commission and publish such application in the Federal Register. Each river designated under clause (ii) shall be administered by the State or political subdivision thereof without expense to the United States other than for administration and management of federally owned lands. For purposes of the preceding sentence, amounts made available to any State or political subdivision under the Land and Water Conservation Act of 1965 [16 U.S.C.A. § 4601-4 et seq.] or any other provision of law shall not be treated as an expense to the United States. Nothing in this subsection shall be construed to provide for the transfer to, or administration by, a State or local authority of any federally owned lands which are within the boundaries of any river included within the system under clause (ii).

"State Act"),[5] the designation was equivocal with respect to the Eel River. By statute the state legislature had explicitly ordered further studies to determine the need to delete that river from the State System in order to permit construction of water supply or flood control facilities.[6] Even more significantly, the Legislature had expressly deferred any commitment for permanent administration of any of the five rivers until after it had approved a management plan which had yet to be completed or submitted to it.[7]

Petitioners sued Governor Brown in state court for declaratory relief and to enjoin him from proceeding with his request to add the rivers to the National System. Petitioners' complaint asserted that the conditional nature of the Legislature's designation of the Eel River and the absence of legislatively-approved management plans for any of the five rivers prevented the Governor from com-

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[5]In 1972 California enacted its own Wild and Scenic Rivers Act, California Public Resources Code § 5093.50 *et seq*. The full text of the State Act as effective during the time frame concerned in this litigation is reproduced in the Appendix to this Petition at App. 104-110.

In 1982 the State Act was amended by California Stats. 1982, chapter 1481, which became effective on January 1, 1983. This measure was expressly made inapplicable to the herein litigation. Cal. Stats., c. 1481, § 19 (App. 139). The full text of Chapter 1481 is reproduced in the Appendix to this Petition at App. 111-139.

All references throughout this Petition to the State Act or portions thereof are to the Act as effective during the events which gave rise to this litigation (*i.e.*, the Act as effective from prior to July 18, 1980, until January 1, 1983, the effective date of Chapter 1481), unless otherwise indicated.

[6]Please see discussion at pp. 14-16, *infra*.

[7]California Public Resources Code § 5093.58 (App. 108.) Please see discussion at pp. 16-18 and accompanying footnotes 15-18, *infra*.

mitting the state to permanent administration of the rivers under the required federal criteria.[8]

On December 5, 1980, six weeks before the Secretary acted, Fred W. Marler, Jr., presiding judge of the California State Superior Court for the County of Sacramento, issued a memorandum decision in which he interpreted the State Act. In relevant part, Judge Marler's decision observed:

> . . . [T]he Legislature did not intend that the Governor could bypass the necessity for legislative approval of management plans by placing the component rivers under a federal program which would place them beyond the management plan approval which the Legislature has reserved to itself.
>
> The conclusion the Court reaches as to statutory construction of California law is that the present state of law and fact in California is such that the Secretary of Resources cannot guarantee to "permanently administer" the five rivers designated by statute. Whether or not Congress intended the same interpretation of the phrase "permanently administer" as the interpretation given by a state Court of a state making application is unknown. However, by way of a dictum, this Court notes that an attempt by Congress to confer power upon a governor in excess of that conferred under state law would be constitutionally suspect.

(App. 186.)[9]

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[8]*County of Del Norte, et al. v. Edmund G. Brown, Jr., et al.*, State of California, County of Sacramento, Superior Court action no. 292019 (filed October 20, 1980).

[9]On April 7, 1981, following protracted further hearings held at the insistence of counsel for the Governor, the state court entered its final judgment, which provided in pertinent part:

> 4. The present state of law and fact under the California Act is such that the Secretary of Resources cannot guarantee

While petitioners' state court action was proceeding, the County of Del Norte and others, who are expected to be petitioners to this Court for writ of certiorari in Ninth Circuit Court of Appeals consolidated cases numbers 83-1761 and 83-2018 (the "North Coast petitioners"), filed a lawsuit in the United States District Court seeking injunctive and declaratory relief against Secretary Andrus and other federal officials. (*County of Del Norte, et al. v. Cecil D. Andrus, et al.*, N.D.-Cal., Docket No. C-80-3964-WAI, filed October 20, 1980.) Petitioners herein followed suit on January 6, 1981. (*County of Del Norte, et al. v. Cecil D. Andrus, et al.*, N.D.-Cal., Docket No. C-81-0035-SAW, filed January 6, 1981.) Both lawsuits sought to enjoin the federal officials from any further processing of the Governor's application for inclusion of rivers, on the bases that the rivers were ineligible for such action and that the environ-

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to "permanently administer" the five rivers in the California system.

• • •

6. The Legislature did not intend that the Governor could bypass the necessity for legislative approval of management plans by placing the component rivers of the California System under a federal program which would place them beyond the management plan approval which the Legislature has reserved to itself.

• • •

IT IS ORDERED, AND JUDGED, AND DECREED as follows:

1. Under the California [Wild and Scenic Rivers] Act, neither the Governor nor the Secretary of Resources of the State of California presently has power to permanently administer the rivers that are components of the California System as wild, scenic or recreational rivers in the absence of legislatively-approved management plans, and until such management plans have been approved by the Legislature, neither official can guarantee that any of those rivers will be permanently administered as wild, scenic or recreational rivers.

(App. 193-195.)

No one appealed, and the state court's judgment became final.

mental review procedures taken under the National Environmental Policy Act ("NEPA") were fatally defective in a number of specified respects.

On December 23, 1980, and January 13, 1981, the North Coast petitioners and the herein petitioners, respectively, brought motions in the district court for summary declaratory judgment and injunctive relief, on the grounds that: (1) as discussed above, the rivers were ineligible for inclusion in the National System; and (2) in any event, the Secretary of the Interior could not validly act on the Governor's request any sooner than January 21, 1981, under applicable federal regulations. On January 16, 1981, following three days of hearings, the district court entered an order declaring that the Secretary of the Interior could take no action on Governor Brown's application until January 21, 1981, the end of the thirty-day period prescribed by applicable federal regulations, 40 C.F.R. §§ 1506.9, 1506.10. (App. 72-79.)

On January 19, 1981, the United States Court of Appeals for the Ninth Circuit ordered the district court's judgment and injunctive order vacated, and remanded the case to the district court with directions to dismiss, on the basis that since no "final agency action" had yet occurred, the case was not ripe for judicial resolution. (App. 80-81.) Later that day, some four hours before he left office, Secretary Andrus, either interpreting state law differently from the state court or simply ignoring the state court's ruling, signed the document purporting to grant the Governor's request.

It is clear from the record in this case, as noted by the district court, that political considerations heavily influenced the timing of the Governor's application and the Department of the Interior's response to it.[10] Thus, the

[10]See footnote 2, *supra*, and App. 27-28.

"Cooperative Work Agreement" between the state and federal agencies responsible for processing the application explicitly provided that their respective representatives would "agree on interim deadlines for completion of the subject documents in the time frame that would allow for a Secretarial decision to be reached by early January, 1981," *i.e.*, before Secretary Andrus left office if the incumbent federal administration were not reelected in November, 1980. (App. 205.) Furthermore, a federal official involved in the processing of the request observed, early on in the process, that the environmental review which the state and federal officials planned to conduct in six months' time would, "under the most optimum conditions," normally require a year or more. (App. 199.)

After Secretary Andrus acted, petitioners filed a new lawsuit in the United States District Court, seeking a judicial declaration that his action was invalid for the same three reasons urged in the previous lawsuit, viz., the rivers' ineligibility for inclusion in the National System, the federal officials' violation of the applicable timing regulations, and the inadequacy of the Final Environmental Impact Statement ("FEIS"). In response to petitioners' motion for summary declaratory judgment on all three causes of action, the district court entered summary judgment declaring that Secretary Andrus' act was void because (1) it had been taken in violation of the thirty-day timing regulations, 40 C.F.R. §§ 1506.9, 1506.10, and (2) the state court's interpretation of state law had not been adequately considered by the Secretary. (App. 21-34.) The district court denied petitioners' motion insofar as they sought summary judgment declaring that the FEIS was inadequate. The court expressly noted that the record presented triable issues of material fact on that question. (App. 31, 33.) Neither defendants nor intervenors filed a cross motion for summary judgment.

The United States and the intervenors appealed, but the State of California did not. The Ninth Circuit Court of Appeals reversed the district court without reaching the principal substantive questions presented by this case, *i.e.*, whether the Secretary can validly place in the National System, a river which the state (1) has not unequivocally designated as wild, scenic or recreational or (2) has not agreed to permanently administer in the absence of further state legislative action. Instead, the court of appeals held that the federal defendants' violation of the thirty-day timing regulation, accomplished through the use of a false affidavit signed by a Department of the Interior employee (App. 8), was mere "trivial error" which did not justify invalidation of the Secretary's act. The court further held that under the presumption of regularity which attaches to administrative officials' acts, the presence in the administrative record of a legal memorandum mentioning Judge Marler's December 5, 1980 decision required that Secretary Andrus' action be upheld. The Ninth Circuit remanded the case to the district court "for entry of judgment in favor of the defendants." (App. 10.)

Petitioners sought rehearing, pointing out that the substantive issues of eligibility had not been addressed, and that entry of judgment in favor of the defendants was inappropriate since the district court had expressly reserved the issues presented by the third cause of action for trial. (App. 12-20.) On July 5, 1984, the Ninth Court denied the petition for rehearing, stating in its order:

> This court reviewed all of the theories of the plaintiffs' motion for summary judgment in order to determine whether there were any grounds for affirmance of the district court's decision. (Citation.) The district court correctly denied plaintiffs' motion for summary judgment to the extent it was based upon a claimed inadequacy of the environmental impact statement. The plaintiffs have never identified any triable issues of

fact in connection with that claim, and we have determined there are none.

(App. 11.)

ARGUMENT IN SUPPORT OF PETITION FOR CERTIORARI

I

THIS CASE PRESENTS IMPORTANT FEDERAL QUESTIONS THAT DESERVE THE ATTENTION OF THIS COURT

This case raises significant issues of federal law and policy which have potentially far-reaching impact nationwide and merit the attention of this Court. One issue of first impression is whether Congress gave the Secretary of the Interior power, under Section 2(a)(ii) of the federal Wild and Scenic Rivers Act, to override a state court and thereby deprive a state of administrative authority over its rivers by substituting his own notion of what constitutes "permanent administration" for a state court's interpretation of the applicable state law on that subject. The interpretation of this federal statute is of national import, for it will have impact on the utilization of public lands throughout the nation. Cf., *U.S. v. Coleman* (1968) 390 U.S. 599, 601.

This case thus also raises the broader question of the extent to which a federal administrative official may reject a state court's contemporaneous interpretation of a state law which he must understand in order to properly apply the federal law. These questions present important issues of federalism and merits further definition by this Court.

Another question of first impression raised by this case, is whether an outgoing federal administrative regime may, with the aid of a false affidavit signed by one of its employees, violate published regulations with impunity by taking refuge in the "trivial error" doctrine. The Ninth Circuit's

opinion has put a judicial stamp of approval on a series of actions which enabled a "lame duck" administration to accomplish an avowedly politicized goal by bending the rules prescribed by applicable federal regulations, 40 C.F.R. §§ 1506.9 and 1506.10. This troublesome application of the "trivial error" doctrine raises the spectre of a recurring open hunting season during which future outgoing administrations may freely reach beyond the limits of their terms in office by ignoring the plain meaning of regulatory enactments. This Court's certiorari jurisdiction should appropriately be exercised to address the important public policy issues raised by the Ninth Circuit's sweeping application of the "trivial error" rule.

The Ninth Circuit's opinion also raises important issues regarding a reviewing court's responsibility to independently review federal agency interpretation of state law, and its ability to prejudicially prevent trial of unresolved, triable issues of material fact.

Over two-thirds of California's people and one-quarter of its lands[11] will feel the direct impact of this case, for if left untouched the Ninth Circuit's opinion will have the immediate effect of precluding water supply development on rivers to which water suppliers throughout the state of California have looked for at least 25 years[12] for the development of future water supplies to meet the needs of California's growing population.[13]

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[11]See App. 144.

[12]I.e., since passage of the Burns-Porter Act (Cal. Water Code § 12390 *et seq.*) and the legislative adoption of the California Water Plan (Water Code § 10004) in 1959. See App. 49-51.

[13]See App. 43. When it enacted the State Act in 1972, the California Legislature expressly recognized the potential need to develop the Eel River, by its mandate that further studies be conducted to determine if the Eel should be deleted from the State System. Cal. Pub. Res. Code § 5093.54, subd. (d); § 5093.56; § 5093.57.

Beyond this direct impact on the people of California, this case has potential indirect impact nationwide due to the broad scope of power to affect state resources, which the Ninth Circuit's decision appears to give to the Secretary of the Interior under 16 U.S.C. § 1273, subd. (a)(ii); and due to the disturbing precedent which that decision sets for legitimating "parting shots" made without observance of published federal regulations, by outgoing federal administrations.

The importance of the federal questions presented, and the far-reaching impact which resolution of these questions will have, warrant the exercise of this Court's certiorari jurisdiction to remedy the defects in the Ninth Circuit's opinion below.

II

THE SECRETARY OF THE INTERIOR ERRED AS A MATTER OF LAW IN ADDING THE AFFECTED RIVERS TO THE NATIONAL SYSTEM

The Secretary of the Interior effectively overrode the contemporaneous interpretation by a state court of state law, and approved the addition of the five California rivers to the National System. He purported to act on the basis of authority granted to him under Section 2(a)(ii) of the Federal Act, 16 U.S.C. § 1271 *et seq.* By allowing the Secretary to add rivers to the National System, Section 2(a)(ii) carves out an exception to the Federal Act's basic design that rivers should be added to the National System "by Act of Congress."[14]

The Secretary's decision clearly exceeded the bounds of his statutory authority, for a state court had ruled that under state law the rivers did not meet the basic statutory requirement that the state first commit itself to perma-

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[14] 16 U.S. Code § 1273, subd. (a)(1), reprinted in full at footnote 4, *supra*.

nently administer the rivers as wild, scenic or recreational under criteria contained in the Federal Act. With respect to the Eel River, this lack of commitment was manifested by the conditional nature of the State Act's designation of the river as wild, scenic or recreational. The California Legislature specifically identified the possibility that it would remove the Eel from the State System if it found a need to construct water supply or flood control impoundments which the Federal Act prohibits. Cal. Pub. Res. Code §§ 5093.54, subd. (d), 5093.56, 5093.57.

With respect to all five rivers, the Legislature had expressly conditioned their permanent administration on its subsequent approval of management plans which had not even been submitted to it. Therefore, as the state court held, neither the Governor of California nor any other member of the state's executive branch of government had the power to permanently administer, or to guarantee permanent administration of, the rivers as required by the Federal Act. In these circumstances, the Secretary's misapprehension of the scope of his own statutory authority had the additional flaw of violating California's constitutional distribution of powers between the Governor and the Legislature.

A. The Secretary Exceeded His Authority When He Destroyed the California Legislature's Expressly Reserved Option to Develop the Eel River to Meet the Needs of California's People

One of the most obvious defects in the Secretary's action is his failure to recognize that California's designation of the Eel River as wild, scenic or recreational reserves legislative authority to remove that designation and allow construction which the Federal Act prohibits. When the California Legislature established the State System in 1972, Cal. Pub. Res. Code § 5093.50 *et seq.*, it carefully reserved authority "to delete all or any segment" of the Eel River from the State System if and when it became necessary to develop that river for water supply

or flood control purposes. Cal. Pub. Res. Code § 5093.54, subd. (d).

The Legislature preserved this authority because of continuing uncertainties over California's ability to provide additional water supplies needed to support its future population and economy, and because California had historically considered the Eel River as an important potential source for those supplies. Indeed, the State undertook the financing and construction of its multi-billion dollar State Water Project (SWP) in reliance on feasibility reports that assumed eventual development of one million acre-feet of annual water supply from the Eel River. (App. 49-51; App. 54-55.) In addition, the ten public water agency petitioners have each entered into a long-term multi-million-dollar water supply contract with the State, that identifies the Eel River as a potential source for at least a portion of the additional two million acre-feet that the State still needs to develop in order to meet its long-term SWP contract obligations. (App. 50-52.)

Thus, the California statute that designates the Eel River as part of the State System also directs California's Department of Water Resources (DWR) to report to it after 1984 on "the need for water supply and flood control projects on the Eel River and its tributaries." Cal. Pub. Res. Code § 5093.54, subd. (d). That statute also expressly authorizes DWR to undertake all "necessary or desirable" studies "to determine the feasibility of alternate sites for dams on the Eel River and its tributaries." Cal. Pub. Res. Code § 5093.56.

In contrast, the Federal Act prohibits construction of dams or other impoundments on rivers in the National System. 16 U.S.C. §§ 1271 and 1286, subd. (d). In addition, the Federal Act prohibits all federal agencies from licensing or otherwise assisting in the "construction of any water resources project" that would have a direct effect on the free-flowing nature of any river in the National System. 16 U.S.C. § 1278, subd. (a).

The Secretary's authority to add a river to the National System requires that he find that the river will be permanently managed by the state to meet the criteria established in the Federal Act, 16 U.S.C. § 1273, subd. (a)(ii). Clearly, California has not agreed to permanently administer the Eel as a wild, scenic, or recreational river, since California's statutes expressly order further studies leading to the possibility of the construction of dams and other facilities on that river.

Congress certainly did not intend to allow the Secretary to preempt states' rights by precluding a state from further water resource development of a river where the state legislature has unequivocally stated its plans to give further consideration to the state's need for such development. Instead, Congress imposed a requirement for unequivocal state legislative designation so that the Secretary could not act to curtail a state's ability to manage its rivers without the concurrence of the state's legislature. The purpose of Congress' requirement that the state's legislature designate the river as wild, scenic or recreational will be completely undermined if the Secretary is allowed to unilaterally deprive the California Legislature of its reserved authority to develop the Eel River's water resources in the future.

The California Act's designation of the Eel River as a wild, scenic or recreational river manifestly does not contain an unequivocal designation of, nor a plan for permanent administration of, the Eel River as wild, scenic or recreational. On its face, that Act reserves authority for potential development. The Secretary's determination that the Eel River met the Federal Act's requirements for inclusion in the National System was therefore an abuse of discretion and an act in excess of his statutory authority, and should be held unlawful. 5 U.S.C. § 706, subd. (2).

B. The Secretary Exceeded His Authority When He Overrode a State Court's Interpretation of State Law

At the time Governor Brown asked Secretary Andrus to place the North Coast rivers in the National System, the

State Act provided only a partial delegation of power to the executive branch of state government with respect to administration of the rivers.

Although the California Legislature had placed the five rivers in the State System[15] and had placed their administration in the hands of the California Secretary for Resources,[16] it had imposed a crucial limitation on his administrative powers. The Legislature required that, before he could "permanently administer" the system, the Secretary for Resources must do all of the following:

> (a) Determine which of the classes described in Section 5093.53 [*i.e.*, wild, scenic, or recreational] best fit each segment of the rivers included in the system.
>
> (b) Prepare a management plan to administer the rivers and their adjacent land areas in accordance with such classification.
>
> (c) *Submit such management plan to the Legislature for its approval.*

Cal. Pub. Res. Code § 5093.58, as enacted by Stats. 1972, c.1259, p.2510, § 1[17] (emphasis added).

No management plan existed for any of the rivers at the time the Governor made his application, and none existed when Secretary Andrus purported to grant Governor Brown's request. (App. 184.) As the state court held in interpreting the State Act, this legislative reservation of power presented an insurmountable obstacle to the Governor's attempt to claim that the rivers were then "to be permanently administered . . . by the State" in accordance with the criteria of the Federal Act:

> While the Resources Secretary does have some power with respect to components of the [State] System . . ., these powers are in the nature of preservation of the rivers in their free-flowing natural condition until

[15] Cal. Pub. Res. Code § 5093.54.

[16] See, Cal. Pub. Res. Code §§ 5093.52, 5093.55, 5093.58, 5093.59, 5093.60 (App. 104-109).

[17] Please see footnote 5, *supra*.

plans for the complete management and administration of the System are approved by the Legislature. It is clear that the Legislature did not intend that the Resources Secretary could administer the System in the interim in such fashion as to avoid the duties mandated by the Act.

It further appears that the Legislature did not intend that the Governor could bypass the necessity for legislative approval of management plans by placing the component rivers under a federal program which would place them beyond the management plan approval which the Legislature has reserved to itself.

The conclusion the Court reaches as to statutory construction of California law is that the present state of law and fact in California is such that the Secretary of Resources cannot guarantee to "permanently administer" the five rivers designated by statute. Whether or not Congress intended the same interpretation of the phrase "permanently administer" as the interpretation given by a state court of a state making application is unknown. However, by way of dictum, this Court notes that an attempt by Congress to confer power upon a governor in excess of that conferred under state law would be constitutionally suspect.

(App. 185-186.)

In these circumstances, the Secretary's action, based upon his interpretation of state law in a manner contrary to the state Court's, was clearly reversible as having been rendered "in excess of his statutory authority", 5 U.S.C. § 706, subd. (2)(C), and as having been "arbitrary, capricious, [and] otherwise not in accordance with the law", 5 U.S.C. § 706, subd. (2)(A).

C. The Secretary's Approval Effectively Violated the State's Constitutional Delegation of Powers

California's Constitution provides that:

The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of

> one power may not exercise either of the others except as permitted by this Constitution.

Cal. Const., Art. III, § 3. Under California law, the power to designate rivers as wild, scenic or recreational, and to approve plans to guarantee permanent administration as such, resides in the Legislature. However, the Secretary attributed that power to the Governor, thus interfering with the state's separation of legislative and executive powers, Cal. Const., Art. III, § 3.

By accepting the Governor's representations that the state would permanently administer the rivers as wild, scenic or recreational rivers under the Federal Act's criteria, the Secretary ran afoul of California's constitutional delegation of powers. As the state court observed, the Governor could not guarantee the necessary "permanent administration," because the Legislature had not yet completed the statutory process for determining how those rivers would be administered in the future. It had not approved (or even received) any of the management plans which the State Act required. Cal. Pub. Res. Code § 5093.58. Nor had it determined whether water supply or flood control impoundments might need to be built on the Eel River to meet future needs, as the State Act contemplated. Cal. Pub. Res. Code §§ 5093.54, subd. (d), 5093.56, 5093.57. The Secretary thus erroneously ascribed to the Governor the power to guarantee permanent administration, a power which he did not possess under California law since the Legislature had retained the power to determine whether, and to what extent, California would permanently administer the rivers.

The Secretary was not without guidance concerning this facet of California law. Judge Marler had stated in his decision that:

> [T]he Legislature did not intend that the Governor could bypass the necessity for legislative approval of management plans by placing the component rivers under a federal program which would place them be-

> yond the management plan approval which the Legislature has reserved to itself.[18]

Moreover, the Governor had a constitutional obligation to preserve the Legislature's continuing authority to determine how the rivers would be permanently managed, and whether to construct water supply or flood control projects in the future on the Eel River. California's Constitution expressly charges the Governor to "see that the law is faithfully executed." Cal. Const., Art V, § 1. That law necessarily includes the State Act.

This Court has long held that the distribution of the powers of a state government between the several branches thereof is a matter for the state to determine, without interference from the federal government. *Highland Farms Dairy v. Agnew* (1936) 300 U.S. 608. The Tenth Amendment to the United States Constitution states that: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Nowhere in the Constitution is the federal government delegated the power to determine the distribution of the internal governmental power of the sovereign states. Neither does it prohibit the states from distributing that power as each state sees fit. Consequently, that is a power reserved to the states under the Tenth Amendment.

In the Federal Act, Congress authorized the Secretary to determine whether the state's government had established the preconditions necessary for inclusion in the National System. Congress did not, however, intend to authorize the Secretary to determine how the state government could allocate among its various branches of the power to create those preconditions. Instead, Congress explicitly required a *legislative* designation as wild, scenic or recreational rivers:

> The national wild and scenic rivers system shall comprise rivers (i) that are authorized for inclusion

[18]App. 186.

> therein by Act of Congress, or (ii) that are *designated as wild, scenic or recreational rivers by* or pursuant to *an act of the legislature of the State or* States *through which they flow,* that are to be permanently administered as wild, scenic or recreational rivers by an agency or political subdivision of the State or States concerned that are found by the Secretary of the Interior, upon application of the Governor of the State or the Governors of the States concerned, or a person or persons thereunto duly appointed by him or them, to meet the criteria established in this chapter and such criteria supplementary thereto as he may prescribe, and that are approved by him for inclusion in the system. . . .

16 U.S.C. § 1273, subd. (a) (emphasis added).

Under the law of the State of California, the legislative power to establish the preconditions for inclusion in the National System is reserved to the legislature. The effect of the Secretary's action was to reallocate the division of governmental authority from the Legislature to the Governor in a manner contrary to the state constitution. This action violated the Tenth Amendment and the rule enunciated in such cases as *Highland Farms Dairy v. Agnew,* 300 U.S. 608, and warrants review and reversal by this Court.

III

THE COURT OF APPEALS DID NOT FULFILL ITS DUTY TO INDEPENDENTLY REVIEW THE SECRETARY'S INTERPRETATIONS OF LAW

The Court of Appeals failed to properly review the Secretary's interpretation of legal issues in at least two respects: It failed to review the adequacy of the Secretary's decision for errors of law generally, and, more specifically, if failed to independently review the Secretary's interpretation of state law. The appellate court merely determined that the related contemporaneous judgment of the California court interpreting the relevant state law had been "drawn to the Secretary's attention" and presumed that

the Secretary had considered it (App. 10). Apparently, the court felt that so long as the Secretary had considered all relevant material, it could not substitute its judgment for that of the Secretary. See, *Citizens to Preserve Overton Park, Inc. v. Volpe* (1971) 401 U.S. 402.

However, the appellate court erred in applying the somewhat narrow *Overton Park* standard of review of agency *judgment* to the secretary's decision, which involved *a legal determination* of state statutes and judicial decisions rather than an exercise of discretionary "judgment".

The Secretarial action reviewed in *Overton Park* was an authorization of the use of federal highway funds to contruct a highway through a public park. The Secretary was empowered to authorize the use of such funds only where he determined that no feasible alternate route existed or that all possible planning to minimize harm to the park had been done. No questions of law were before the Secretary; rather, he had merely to determine whether the facts justified the findings necessary for authorization of the funds. This Court held that a reviewing court in that situation had the responsibility to review the facts, but only to determine "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *(Overton Park, supra,* 401 U.S. 416.)

The issue here is not whether the Secretary reasonably exercised his judgment on the facts, but whether he was correct in his determination of the applicable state law. In reviewing the Secretary's legal conclusion, the appellate court was obliged to do more than merely determine that the Secretary had considered all relevant factors; the court was required to make its own determination of the underlying legal issues.

When adding rivers to the National System under Section 2(a)(ii), the Secretary is required to decide whether state law provides the preconditions necessary for inclu-

sion. Consequently, in the case at bench, the Secretary of the Interior was called upon to interpret California law to determine whether California would permanently administer the rivers as wild, scenic or recreational within the meaning of Section 2(a)(ii) of the Federal Act, which requires that:

> 1. The State Legislature have designated the rivers as wild, scenic or recreational rivers;
>
> 2. The State have committed itself to permanently administer the rivers as wild, scenic or recreational rivers at no expense to the United States; and
>
> 3. The Secretary find that the rivers meet the federal criteria for wild, scenic and recreational rivers.

16 U.S.C. § 1273(a)(ii) (App. 88, 89).

The last of these three requirements may be said to call for a Secretarial exercise of discretion, in the sense that he must determine whether a river meets the qualitative criteria of the Federal Act[19] and is worthy of inclusion in the National System. But there is no similar exercise of discretion to be made concerning the first two requirements, (1) that the state legislature have designated the river as wild, scenic or recreational, and (2) that the state have made a commitment to permanently administer the river under the Federal Act's criteria.

The Secretary's conclusion that the California rivers met those requirements consequently required an interpretation of law, in this case the State Act, Pub. Res. Code § 5093.50 *et seq.*, and of the related rulings of the California courts. And, where state case law has interpreted the statute in question, that law must be followed by the federal courts, absent exceptional circumstances. *Mullaney v. Wilbur* (1975) 421 U.S. 684, 691; *Fidelity Union Trust Co. v. Field*

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[19] I.e., to determine whether a river is one "which, with [its] immediate environments, possess[es] outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values. . . ." 16 U.S.C. § 1271 (App. 88).

(1940) 311 U.S. 169. The only proper legal conclusion in this case was that, due to the lack of permanent administration as wild, scenic or recreational by the state, the rivers were ineligible for inclusion in the National System.

In reviewing the Secretary's interpretation of California law, the appellate court had a responsibility to carry out a *de novo* review of the legal issues involved, since it was ruling on an appeal from a grant of summary judgment. *Roberts v. Elaine Powers Figure Salons, Inc.* (9th Cir. 1983) 708 F.2d 1476, 1478, 1481; *Grand Canyon Dories v. Idaho Outfitters and Guides* (9th Cir. 1983) 709 F.2d 1250, 1252 (affirming a legal interpretation that the Federal Wild and Scenic Rivers Act did not preempt a local statute); *State ex rel. Edwards v. Heimann* (9th Cir. 1980) 633 F.2d 886, 888 n.1. (imposing *de novo* review on appeal from summary judgment reviewing administrative agency's construction of state and federal statutes). The Ninth Circuit has also recently clarified its responsibility to give full *de novo* review to state law determinations of the district courts. *Churchill v. F/V Fjord* (en banc; Ninth Circuit Court of Appeals docket number 82-3644, decided August 7, 1984). Certainly, the appellate court should impose at least the same degree of review on state law determinations made by federal administrative agencies.

The court's responsibility to review the underlying legal issues is particularly important where, as here, the summary judgment under appeal was based on an Administrative Procedures Act, 5 U.S.C. § 551 *et seq.*, review of a federal agency's legal determinations. That Act requires the reviewing court to make an independent review of the administrative agency's legal determinations, by directing that:

> To the extent necessary to decision and when presented, the reviewing court *shall* decide all relevant questions of law, interpret constitutional and statutory

> provisions, and determine the meaning or applicability of the terms of an agency action . . .

5 U.S.C. § 706 (emphasis added).

This Court has stated that it is the *duty* of the federal courts to correct agency errors of law:

> When an administrative agency has made an error of law, the duty of the Court is to 'correct the error of law committed by that body, and after doing so to remand the case to the [agency] so as to afford it the opportunity of examining the evidence and finding the facts as required by law.' *ICC v. Clyde S.S. Co.*, 181 U.S. 29, 32-33, 21 S. Ct. 512, 514 (1901), 45 L. Ed. 729.

NLRB v. Ent. Ass'n. of Steam, Hot Water, etc. (1977) 429 U.S. 507, 522 n.9; accord, *Nat. Assn. of Greeting Card Pubs. v. USPS* (1983) ..... U.S. ..... [77 L. Ed. 2d 195, 207 n.19].

The Secretary has made an error of law, rather than an error of judgment as asserted in *Overton Park*, and the appellate court had the duty to correct it. Moreover, little deference need be accorded the *federal* agency's construction of *state* law, since that is not a matter within the agency's expertise or discretion. The reviewing courts must therefore make their own independent review of federal agency determinations of state law. See, *State ex rel. Edwards v. Heimann* (9th Cir. 1980) 633 F.2d 886, 888 (state banking law); *Kasey v. Richardson* (4th Cir. 1972) 462 F.2d 757, 759 (state family law); *Baber v. Schweiker* (D.C. 1982) 539 F.Supp. 993, 995 (state family law).

The appellate court did not carry out such a review here. It instead applied the *Overton Park* deferential standard. Application of that deferential standard to the legal determination which the Secretary is required to make under Section 2(a)(ii) is a misreading of the rationale of *Overton* and an abrogation of the reviewing court's "duty" under the Administrative Procedures Act and *NLRB v. Ent. Ass'n. of Steam, Hot Water, etc., supra*, 429 U.S. 507. The Ninth Circuit's opinion should be reversed for its failure to reach and determine this issue.

IV

THE NINTH CIRCUIT'S DECISION ESTABLISHES A DISTURBING PRECEDENT FOR ALLOWING OUTGOING ADMINISTRATIONS FREE LICENSE TO POLITICIZE AGENCY DETERMINATIONS

There is no serious dispute about the fact that political considerations underlay the timing of the various actions which gave rise to this litigation. From the outset one of Governor Brown's and the state and federal defendants' primary goals was to complete the entire decision-making process "in the time frame which would allow for a Secretarial decision" before Secretary Andrus departed from office. (App. 205.) Consistent with this objective, the Secretarial Issue Document was signed at 745 p.m. on the Secretary's last day in office. (App. 86.)

Defendants achieved their goal, with only hours to spare, with the assistance of a false affidavit signed by a Department of the Interior employee, who certified under oath that copies of the FEIS had been distributed to the public when in fact they had not. (App. 17.) This false statement enabled publication of the Notice of Availability of the FEIS to appear in the *Federal Register* one week earlier than it would have, had the truth been told. Had the Notice of Availability been published one week later, in accordance with law, Governor Brown's application would have been referred to Secretary Andrus' successor for action.

The Ninth Circuit Court of Appeals decided that, since this truncation of the thirty-day period described by 40 C.F.R. Section 1509.10 did not operate to deprive petitioners of any substantive right to comment or to further review, the premature publication of the Notice of Availability, accomplished through the use of a false affidavit, should be dismissed as mere "trivial error" with the result that Secretary Andrus' action could be upheld. It is difficult to imagine a clearer statement that an outgoing administration may bend the rules with impunity, in order to

achieve objectives which the normal course of the political process would otherwise put beyond its reach. The Ninth Circuit's decision establishes a disturbing precedent which is distinctly out of harmony with "our historic commitment to the rule of law" which this Court has recognized. *United States v. Nixon* (1974) 418 U.S. 683, 708. This Court should review and reverse the Court of Appeals' decision construing federal regulations in a manner which sanctions such misconduct.

V

THE COURT OF APPEALS IMPROPERLY DEPRIVED PETITIONERS OF THEIR RIGHT TO TRIAL ON THE ADEQUACY OF THE FINAL ENVIRONMENTAL IMPACT STATEMENT

One of the three bases upon which the petitioners sought summary judgment in the district court was that Secretary Andus' action was invalid because it was based on a final environmental impact statement (FEIS) which failed in a number of prescribed particulars to satisfy the requirements of NEPA, 42 U.S. Code § 4321 *et seq.*, applicable Council on Environmental Quality regulations, 40 C.F.R. § 1502.14 et seq. (App. 140-145), and the Department of the Interior procedures, 45 Fed.Reg. 27541-27549 (App. 146-181). Petitioners' moving papers included a number of experts' declarations describing the various ways in which the FEIS was perceived by them to be inadequate. Respondents and Intervenors did not bring any cross-motion for summary judgment on this basis, but filed counter-declarations and argument attempting to demonstrate that the FEIS was *not* inadequate in any of the respects urged by petitioners.

The district court denied petitioners' motion, finding that "none of the . . . issues [identified by petitioners] are susceptible of resolution on motion for summary judgment." (App. 31.) Because petitioners' experts' declara-

tions were controverted in many instances by defendants' experts' declarations, the district court concluded that the record raised a triable issue of material fact sufficient to preclude the granting of summary judgment. As to a number of issues, the court observed:

> These are complex issues of great moment to the future well being of California. The only appropriate vehicle of resolution is trial.

(App. 33.) It is plain from the district court's memorandum decision that the Court perceived triable issues of material fact to be raised by the record, and believed a trial to be necessary in order to resolve the issues thus framed. (See generally, App. 31-34.)

As noted above, the Ninth Circuit's opinion remanded the case to the district court with directions to enter judgment on all causes of action for defendants. While the opinion did not explicitly mention the third cause of action, its broad reach appeared to include the third cause of action. Accordingly, petitioners sought rehearing, pointing out that the district court had explicitly reserved the third cause of action for trial, and inviting the Ninth Circuit to declare that its direction for entry of judgment did not apply to the third cause of action. (App. 12-20.)

The Ninth Circuit's somewhat startling response evinces some confusion over the proper role of a Court of Appeals on review of a trial court order denying summary judgment. The Ninth Circuit's order states:

> The district court correctly denied plaintiffs' motion for summary judgment to the extent it was based upon a claimed inadequacy of the environmental impact statement. The *plaintiffs have never identified any triable issues of fact in connection with that claim, and we have determined there are none.*

(App. 11 (emphasis added).)

It was petitioners' burden, as moving parties in the district court, to establish that *no* triable issues of fact existed. The district court instead found that the record raised such triable issues, and accordingly denied the motion for summary judgment, expressly reserving the third cause of action for trial on the merits. The Ninth Circuit's order effectively gives summary judgment in favor of defendants, nonmoving parties below or on appeal.

While in theory this was at least something short of an extrajurisdictional act, see 6 *Moore's Federal Practice* (2nd ed.), ¶ 56.12, p.56-331, any inherent judicial power to grant summary judgment in favor of a nonmoving party surely must be exercised even at the district court level with great restraint and judiciousness. *Id.* at p.56-334. This limitation applies *a fortiori* to a court of appeals on review of a district court order denying summary judgment. *Fountain v. Filson* (1949) 336 U.S. 681.

In this case, where the district court explicitly found that the record raised important issues of fact which could be appropriately resolved only by trial, the Ninth Circuit clearly overstepped its boundaries in second-guessing the district court's assessment of the factual record before it, and taking away petitioners' right to a trial on the those issues. Had petitioners been on notice that a cross-motion for summary judgment was pending against them on the basis that the FEIS was conclusively *adequate* as a matter of law, petitioners could have prepared a factual showing sufficient to meet such contentions and preserve their right to determine by plenary trial whether the FEIS was adequate. The Ninth Circuit's order directing entry of judgment in favor of defendants operated to deprive petitioners, without notice or hearing, of their right to a day in court on those issues. This represents a substantial infringement of petitioners' rights to due process, and warrants reversal of the Ninth Circuit's decision.

CONCLUSION

Important questions of federal law and policy with significant potential impact nationwide are raised by this case. At bench is a question of first impression concerning the scope of the power Congress gave to the Secretary of the Interior when it authorized him to place a state's rivers in the National Wild and Scenic Rivers System under Section 2(a)(ii) of the federal Wild and Scenic Rivers Act. In addition, this case presents a question of first impression concerning the extent to which the doctrine of "trivial error" should allow a departing federal official to effectively extend his tenure through the violation of valid and applicable federal regulations. Finally, this case presents of important nationwide issues concerning the scope of review which federal courts should give to federal administrators' interpretations of law, and the extent to which a federal Court of Appeals may grant summary judgment in favor of a nonmoving party when the district court has found that triable issues of material facts are presented by the record before it.

Because these are special and compelling reasons justifying the exercise of this Court's certiorari jurisdiction, petitioners respectfully request that the Court grant their petition and issue its writ of certiorari in this case to the United States Court of Appeals for the Ninth Circuit.

Dated: October 1, 1984

Respectfully submitted,

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No. 84-544

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CLERK

In the Supreme Court

OF THE

United States

ASSOCIATION OF CALIFORNIA WATER AGENCIES; ANTELOPE VALLEY-EAST KERN WATER AGENCY; CASTAIC LAKE WATER AGENCY; COACHELLA VALLEY COUNTY WATER DISTRICT; CRESTLINE-LAKE ARROWHEAD WATER AGENCY; DESERT WATER AGENCY; KERN COUNTY WATER AGENCY; THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA; MOJAVE WATER AGENCY; SAN BERNARDINO VALLEY MUNICIPAL WATER DISTRICT; and SAN GABRIEL VALLEY MUNICIPAL WATER DISTRICT,

Petitioners,

vs.

THE UNITED STATES OF AMERICA; THE DEPARTMENT OF THE INTERIOR; and JAMES G. WATT, SECRETARY OF THE DEPARTMENT OF THE INTERIOR,

Respondents.

ENVIRONMENTAL DEFENSE FUND; SIERRA CLUB; CALIFORNIA TROUT; and SAVE THE AMERICAN RIVER ASSOCIATION,

Intervenors.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TABLE OF CONTENTS

	Page
Appendix A—[732 F.2d 1462] Opinion of the United States Court of Appeals for the Ninth Circuit, May 11, 1984	A-1
Appendix B—Order of the United States Court of Appeals for the Ninth Circuit, denying rehearing July 5, 1984	A-11
Appendix C—Petition for Rehearing Before the United States Court of Appeals for the Ninth Circuit, May 25, 1984	A-12
Appendix D—Memorandum of Decision of United States District Court, N. D. Cal., February 9, 1983	A-21
Appendix E—Judgment of the United States District Court, N. D. Cal., March 24, 1983	A-35
Appendix F—Declaration of John R. Teerink, filed in United States District Court, N.D. Cal., as Exhibit F in Support of Petitioners' Summary Judgment Motion, May 19, 1981	A-38
Appendix G—Supplemental Declaration of John R. Teerink, filed in United States District Court, N.D. Cal., in Support of Petitioners' Summary Judgment Motion, June 26, 1981	A-47
Appendix H—Memorandum of Decision of the United States District Court, N.D. Cal., [in Action No. C-80-3964-WAI], January 16, 1981	A-72
Appendix I—Order of the United States Court of Appeals for the Ninth Circuit, Vacating United States District Court's January 16, 1981 Order, and Directing Dismissal of Action [in Action, No. C-80-3964-WAI and Others], January 19, 1981	A-80

TABLE OF CONTENTS

Page

Appendix J—Notice of Approval for Inclusion in the National Wild and Scenic Rivers System as State Administered Components, January 19, 1981 [published January 23, 1981], 46 Federal Register 7484-01 ..... A-82

Appendix K—Text of Federal and State Constitutional and Statutory Measures Cited in Petition for Writ of Certiorari A-87

Appendix L—Text of California Wild and Scenic Rivers Act (California Public Resources Code § 5093.50) as in effect through December 31, 1982 A-104

Appendix M—Text of California Statutes 1982, Chapter 1481 (Assembly Bill No. 1349) A-111

Appendix N—Relevant Code of Federal Regulations Procedures Governing Environmental Reviews Under NEPA A-140

Appendix O—Department of the Interior Revised Implementing Procedures for National Environmental Policy Act, April 23, 1980 ..... A-146

Appendix P—Memorandum Decision of State of California, County of Sacramento Superior Court, December 5, 1980 ..... A-182

Appendix Q—Judgment with Findings of Fact and Conclusions of Law of State of California, County of Sacramento Superior Court, April 7, 1981 ..... A-190

Appendix R—Telegram from Director, United States Department of the Interior Heritage Conservation and Recreation Service, June 25, 1980 .. A-196

TABLE OF CONTENTS

Page

Appendix S—Telegram from Brian O'Neill, United States Department of the Interior Heritage Conservation and Recreation Service, July 21, 1980 .. A-198

Appendix T—Cooperative Work Agreement Between State of California Resources Agency and Federal Heritage Conservation and Recreation Service, August 20, 1980 ..... A-203

Appendix A

In the United States Court of Appeals
For the Ninth Circuit

Nos. 83-1761 and 83-2018
D.C. No. CV 81-0567 WAI

Nos. 83-1770 and 83-2019
D.C. No. CV 81-1457 WAI

County of Del Norte, et al.,
Plaintiffs-Appellees,
v.
United States of America, et al.,
Defendants-Appellants.

Association of California Water Agencies, et al.,
Plaintiffs-Appellees,
v.
United States of America, et al.,
Defendants-Appellants.

Environmental Defense Fund, et al.,
Intervenors-Appellants, Cross-Appellees.

[Filed May 11, 1984]

Opinion

Appeal from the United States District Court for the Northern District of California

William A. Ingram, District Judge, Presiding
Argued and submitted November 16, 1983

Before: Goodwin, Schroeder, and Farris, Circuit Judges.
Schroeder, Circuit Judge.

This is a challenge to the Secretary of the Interior's designation of parts of five northern California rivers as components of the national wild and scenic river system under the Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271-1287 (1982). Plaintiffs include several California counties

and entities that represent timber and water interests. The district court entered summary judgment in favor of the plaintiffs, holding that the designation was defective because of procedural irregularities. The government appeals.

Secretary of the Interior Cecil Andrus designated the rivers in January, 1981, during the waning hours of the Carter administration. As required by the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370 (1976 & Supp. V 1981), the designation followed completion of an Environmental Impact Statement (EIS). 42 U.S.C. § 4332. It is apparent from the record that the State of California, which originally proposed the designation, and the Heritage Conservation and Recreation Service (HCRS), the Department of the Interior division which processed the application,[1] favored expeditious completion of all NEPA requirements so that action could be taken on the proposal before the Carter administration left office. It is equally apparent that those opposing designation, including the plaintiffs in this case, wished to delay final consideration by the Secretary until the new President took office.

The principal issue before us is whether the designation is invalid because the HCRS failed to follow two EIS timing regulations, 40 C.F.R. §§ 1506.9 and 1506.10. The HCRS circulated copies of the EIS to commenting agencies and made copies available to the public on the same day as publication in the Federal Register of notice that the EIS had been filed with the Environmental Protection Agency (EPA). Applicable NEPA regulations call for notice in the Federal Register during the week following filing, rather than the same week. We conclude that any violation of these regulations must be regarded as insignificant and within the scope of another portion of the same series of regula-

---

[1]The functions of the HCRS are now performed by the National Park Service. 46 Fed. Reg. 34,329 (1981).

tions which provides that trivial violations shall not form the basis for independent causes of action. 40 C.F.R. § 1500.3 (1983). The deviation from requirements of the regulations here did not justify judicial invalidation of the designation. We therefore reverse.

Resolution of the legal issue requires an understanding of the relationship between two of the regulations promulgated by the Council on Environmental Quality (CEQ) to ensure substantial compliance with the policies set forth in NEPA. The first regulation, 40 C.F.R. § 1506.9 (1983), requires that EISs be filed with EPA. It also provides that an EIS should not be filed with EPA before it is transmitted to commenting agencies and made available to the public.[2] The second regulation, 40 C.F.R. § 1506.10 (1983), requires published notice in the Federal Register of the filing of an EIS that has been "filed [with EPA] during the preceding week." 40 C.F.R. § 1506.10(a). It provides that no decision on the proposed action may be made until at least 30 days after Federal Register publication. 40 C.F.R. § 1506.10(b)(2).[3]

---

[2] 40 C.F.R. § 1506.9 (1983) states, in relevant part:

> Environmental impact statements together with comments and responses shall be filed with the Environmental Protection Agency . . . Statements shall be filed with the EPA no earlier than they are also transmitted to commenting agencies and made available to the public.

[3] 40 C.F.R. § 1506.10 (1983) states:

> (a) The Environmental Protection Agency shall publish a notice in the FEDERAL REGISTER each week of the environmental impact statements filed during the preceding week. The minimum time periods set forth in this section shall be calculated from the date of publication of this notice.
>
> (b) No decision on the proposed action shall be made or recorded . . . by a Federal agency until . . .
>
> . . .
>
> (2) Thirty (30) days after publication of the notice described above in paragraph (a) of this section for a final environmental impact statement.

The precise sequence of events at issue began on December 12, 1980. On that date the Department of the Interior filed with EPA the final EIS on the proposed designation. Upon filing the EIS, an agency official signed a form affidavit provided by EPA confirming that the statement was available for inspection by the public and had been circulated to interested agencies. In fact, on December 12, the statement was available only on a very limited basis and had not yet been sent to the agencies.

By the following Wednesday, December 17, however, when the notice of filing was published, circulation to agencies had been completed and copies were available in quantity to the public. Plaintiffs actually received copies on this date. Secretary Andrus made the designation of the rivers on January 19, 1981, 33 days after the notice had been published.

The sequence can be better visualized by use of the following time line:

July 18, 1980: Governor of California proposes inclusion of rivers in the wild and scenic river system.

September 16, 1980: Draft EIS filed with EPA.

November 5, 1980: Presidential election.

November 14, 1980: Some plaintiffs obtain temprary restraining order, extending comment period on the draft EIS.

December 1, 1980: Temporary restraining order dissolved for lack of jurisdiction.

December 5, 1980: Comment period on draft EIS is closed.

Friday, December 12, 1980: HCRS official files final EIS and signs form verifying that distribution has

been completed. Copies of the final EIS are available at agency offices in San Francisco and Washington, D.C.

Monday, December 15, 1980: Distribution of final EIS by mail is completed.

Wednesday, December 17, 1980: Final EIS is available in quantity to the public. Plaintiffs' counsel obtain copies. Federal Register publishes notice that the final EIS has been filed with EPA.

January 19, 1981: Secretary of the Interior makes the designation.

The time line illustrates several important facts. First, the agency followed all timing requirements for preparation of the EIS itself. In fact, the comment period on the draft EIS lasted substantially longer than the minimum 45 days required by 40 C.F.R. § 1506.10(c). Second, the notice in the Federal Register, which signified filing with EPA, availability to the public, and circulation to commenting agencies of the EIS, did so accurately when it appeared on December 17. Finally, when the Secretary designated the rivers on January 19, more than the required 30 days following publication had passed. 40 C.F.R. § 1506.10(b)(2).

The irregularity in filing the notice before circulation therefore had no effect whatsoever on the plaintiffs' opportunity to review the EIS after publication of the notice; nor did it affect the opportunity of the interested agencies and members of the public to review the statement for 30 days following publication. The "premature" publication about which the plaintiffs complain is significant only because delay of a week in publication would have prevented the matter from being decided by Secretary Andrus rather than by his successor. It was, however, in large part the actions of these plaintiffs, in obtaining a temporary restraining order in November, 1980, that made the "pre-

maturity" significant. The order delayed approval of the EIS for seventeen days before the district court dissolved it for lack of jurisdiction.

These facts are important to bear in mind in evaluating plaintiffs' claim that the designation should be set aside because of the deviation from the sequence of distribution and filing called for in the CEQ regulations. The regulations in question are part of a series issued under the authority of NEPA to establish orderly procedures for administration of the Act. *See* National Environmental Policy Act—Regulations: Supplementary Information, 43 Fed. Reg. 55,978 (1978). Section 1500.1, which sets forth the purpose of the regulations, emphasizes that the procedures "must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken." 40 C.F.R. § 1500.1(b).

Section 1500.3 of the regulations states that compliance with them should not be subject to judicial review until after final action on the proposal, and that the Council intended that "any trivial violation of these regulations not give rise to any independent cause of action." 40 C.F.R. § 1500.3. The Council's discussion of the regulations in the Federal Register during their drafting makes the purpose and history of the latter provision more explicit. Several comments had reflected concern that litigation over "trivial departures from the requirements established by the Council's regulations" could result in judicial invalidation of agency actions. Stating that "[t]his is not the Council's intention," the CEQ added a sentence to the final version "to indicate the Council's intention that a trivial departure from the regulations not give rise to an independent cause of action under law." National Environmental Policy Act —Regulations: Comments and the Council's Response, 43 Fed. Reg. 55,981 (1978).

The regulations themselves thus contain an implicit admonition not to use claims of technical violations as tactics for delaying agency action. Any violation which in the end requires the agency action to be set aside must have borne some relationship to the decision making process itself.

The question in this case then becomes whether the violation of the regulations, by publishing notice in the Federal Register on the day circulation of the EIS was complete rather than during the following week, is "trivial." The purpose of 40 C.F.R. §§ 1506.9 and 1506.10 is to ensure that all pertinent information is available on proposed action for a period of 30 days before final action is taken, and that interested parties have notice of that availability. This 30-day period is not for the purpose of additional public comment and review, *California v. Block,* 690 F.2d 753, 771 (9th Cir. 1982), but, in the words of one commentator, is "to allow a sufficient review period for the final statement and comments and views of commenting agencies 'to accompany the proposal through the existing agency review process.'" 2 F. Grad, *Treatise on Environmental Law* § 9.02 at 9-113 (1980) (quoting 42 U.S.C. § 4332(2)(C)). The provision for publication the week following distribution and filing of the EIS is no more than a precautionary measure to ensure the desired result.

Here, although the HCRS failed to take the precaution, the result was achieved in any event. All distribution requirements had been met by the time of publication: the required 30 days did elapse; the EIS materials were available and accompanied the EIS through the final review process during the 30-day period. The integrity of the decision making process within the government and the public's opportunity to comment in accordance with all legal requirements were not compromised in any way.

Although this is a case of first impression under these regulations, the trivial error provision is analogous to the general rule that insubstantial errors in an administrative proceeding that prejudice no one do not require administrative decisions to be set aside. 5 U.S.C. § 706 (1982). *See, e.g., Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978) ("single alleged oversight on a peripheral issue . . . must not be made the basis for overturning a decision properly made after an otherwise exhaustive proceeding"); *Small Refiner Lead Phase-Down Task Force v. United States Environmental Protection Agency*, 705 F.2d 506, 549 (D.C. Cir. 1983) (even if agency fails to give notice in statutorily prescribed manner, actual notice renders error harmless); *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1022-23 (9th Cir. 1980) (where failure to obtain comments from an agency under NEPA caused no prejudice, dam project would not be enjoined); *Consolidated Gas Supply Corp. v. Federal Energy Regulatory Commission*, 606 F.2d 323, 328-29 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980) (agency decision will not be overturned based on technical error if the agency would have reached the same decision absent the error); *Greater Boston Television Corp. v. Federal Communications Commission*, 444 F.2d 841, 851 (D.C. Cir.), *cert. denied*, 403 U.S. 923 (1971) (supervisory function of the court requires it to intervene when the agency has not taken a "hard look" at issues, but court will not upset a decision because of errors that are not material). The district court relied upon *Buschmann v. Schweiker*, 676 F.2d 352 (9th Cir. 1982), in which the court refused to excuse for lack of prejudice an agency's failure to follow regulations. In *Buschmann*, however, the error was prejudicial to the plaintiffs and the review process because plaintiffs were denied notice and the opportunity to comment on a proposed agency rule.

While we conclude that no violation of the law occurred that was sufficient to undermine the validity of the designation, we are both mindful and respectful of the district court's concern about the HCRS staff member's false declaration, when he filed the notice with EPA, that circulation requirements already had been met. The district court was of the view that the false statement itself was a blemish on the decision making process. There was, however, neither evidence nor any finding of bad faith in connection with the declaration. On appeal, plaintiffs properly have refrained from arguing that the falsity of the declaration has any independent significance.

Plaintiffs argued strenuously before the district court that the Secretary in making the designation had failed to consider language from a California Superior Court opinion in a suit by many of these same plaintiffs to enjoin the California Governor from applying for federal designation of the rivers. *County of Del Norte v. Brown,* No. 292019 (Cal. Super. Ct. Sacramento Cty. 1980) (memorandum decision). The state court held that it had no power to prevent the application for wild and scenic river status under federal law. The court admonished, however, that in deciding on the designation the Secretary must take into account the state court's conclusion that the rivers could not be "permanently administered" under the California Wild and Scenic Rivers Act, Cal. Pub. Res. Code § 5093.50-5093.69 (Cum. Supp. 1984). The state's ability to "permanently administer" the rivers under state law is a requirement for the federal designation at issue here. 16 U.S.C. § 1273(a)(ii). The district court found that the admonition had not been drawn to the Secretary's attention and remanded to the agency under *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416 (1971) ("court must consider whether the decision was based on a consideration of the relevant factors").

Full review of the record reveals, however, that the decision was both paraphrased in a memorandum to the Secretary and attached in full as an addendum to that memorandum. The Secretarial Issue Document noted the state court opinion, but concluded that sufficient other state law protections existed to satisfy the permanent administration requirement under the federal act. The record thus belies the contention that the state court opinion was not considered. In the absence of clear evidence to the contrary, courts presume that public officers properly discharge their duties, including reading memoranda addresed to them. *See* 3 K. Davis, *Administrative Law Treatise* § 17.6 (2d ed. 1980) (quoting *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926)).

Also disputed before the trial court was the question of standing. It is now apparent that at least some of the plaintiffs had standing, and we need not discuss the government's argument that the entire case should have been dismissed for lack of it. *See California v. Block*, 690 F.2d at 776 (governmental entities have standing if they are nearby the proposed action site geographically and are among the entities consulted during the EIS process; citing 42 U.S.C. § 4332(2)(C)).

The judgment of the district court is reversed and the matter is remanded for entry of judgment in favor of the defendants.

Appendix B

In the United States Court of Appeals
For the Ninth Circuit
Nos. 83-1761 and 83-2018
D.C. No. CV 81-0567 WAI
Nos. 83-1770 and 83-2019
D.C. No. CV 81-1457 WAI
(Northern District of California)
County of Del Norte, et al.,
Plaintiffs-Appellees,
v.
United States of America, et al.,

Association of California Water Agencies, et al.,
Plaintiffs-Appellees,
v.
United States of America, et al.,
Defendants-Appellants.
Environmental Defense Fund, et al.,
Intervenors-Appellants, Cross-Appellees.
[Filed July 5, 1984]

Order

Before: Goodwin, Schroeder, and Farris, Circuit Judges.

This court reviewed all of the theories of the plaintiffs' motion for summary judgment in order to determine whether there were grounds for affirmance of the district court's decision. *See Thomas P. Gonzalez Corp. v. Consejo Nacional de Produccion de Costa Rica,* 614 F.2d 1247, 1256 (9th Cir. 1980) (citing cases). The district court correctly denied plaintiffs' motion for summary judgment to the extent it was based upon a claimed inadequacy of the environmental impact statement. The plaintiffs have never identified any triable issues of fact in connection with that claim, and we have determined there are none.

The petition for rehearing is denied.

Appendix C

In the United States Court of Appeals
For the Ninth Circuit

Nos. 83-1761 and 83-2018
DC # CV 81-0567 WAI

County of Del Norte, et al.,
Plaintiffs-Appellees,
vs.
United States of America, et al.,
Defendants-Appellants.

Nos. 83-1770 and 83-2019
DC # CV 81-1457 WAI

Association of California Water Agencies, et al.,
Plaintiffs-Appellees,
vs.
United States of America, et al.,
Defendants-Appellants.

Environmental Defense Fund, et al.,
Intervenors-Appellants, Cross-Appellees.

PETITION FOR REHEARING
(Fed. Rules of App. Proc., Rule 40)

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INTRODUCTORY STATEMENT

Pursuant to Federal Rules of Appellate Procedure, Rule 40, the water agency plaintiffs-appellees (hereinafter "petitioners") hereby petition this Court for rehearing of the above-captioned matter. This petition is brought upon the basis that, in petitioners' opinion, the Court's May 11, 1984 decision in this matter has overlooked material fact and law in the following respects:

1. The principal legal issue raised by petitioners was not, as the Court's Opinion states (Opinion, p. 2, lns. 24-26), whether the Secretary's action is invalid due to HCRS' failure to comply with EIS timing regulations. More important to petitioners was the foundational issue whether, as a matter of law, the Secretary of the Interior had authority under the National Act to include the rivers in the National System in view of the following facts:

   a. The California Legislature's express intention to determine in 1985 or thereafter whether it should enact legislation to delete the Eel River or its tributaries from the California Wild and Scenic Rivers System due to the possible need to develop water supply or flood control projects on them; and

   b. The California court's decision that under California law the rivers could not be "permanently administered" under the California Wild and Scenic Rivers Act.

2. Determination of the foregoing issues requires judicially reviewable legal interpretations of federal and state law, rather than mere presumptively-valid prior consideration by the Secretary, as the Opinion indicates (Opinion, p. 12, lns. 5-18).

3. The Opinion directs the District Court to enter judgment in favor of defendants (Opinion, p. 13, lns. 1-3), despite the fact that the District Court reserved the issue of the adequacy of the EIS for trial (19 ERC 1143, 1144).

ARGUMENT

1. The Cause Should Be Reheard in Order to Resolve Material Questions of Law Which Were Overlooked in the Opinion.

The principal legal issue asserted by petitioners is not merely whether appellants' failure to comply with the EIS timing regulations invalidates the Secretary's action. Equally at issue is the question whether the Secretary's inclusion of the rivers in the National System is substantively invalid under the National Wild and Scenic Rivers Act (16 U.S.C. § 1271, *et seq.*). Plaintiffs' argument before the District Court on the issue of permanent administration of the rivers raised significantly more than the single issue of whether the Secretary had considered or failed to consider the language from the California Superior Court's opinion in *County of Del Norte, et al. v. Edmund G. Brown, Jr., et al.* (State of California, County of Sacramento, Superior Court No. 292019) before he signed the Secretarial Issue Document on January 19, 1981. (Opinion, p. 11, lns. 9-11).

Rather, petitioners based their argument upon the underlying fact that California's Legislature had expressly retained statutory powers over the rivers which preclude the required Secretarial findings under the National Act. (See "Memorandum of Points and Authorities In Support of Plaintiffs' Motion for Summary Judgment," filed in the District Court in action No. C 81-1457-WAI on May 19, 1981, at pp. 10-15; "Plaintiffs' Reply to Federal Defendants' and Proposed Intervenor's Opposition to Plaintiffs' Motion for Summary Judgment," filed in the District Court in action No. C 81-1457-WAI on June 9, 1981, at pp. 24-27; "Brief of Appellees Association of California Water Agencies, et al.," filed herein on September 2, 1983, at pp. 4-6; p. 9, n. 5; pp. 23-24.) Indeed, the nature and scope of the Secretary's authority under that Act, to transfer ultimate control over vital state natural resources from the state's

legislature to federal administrators, is a question of first impression that merits careful consideration.

Such consideration is particularly appropriate here, where the defect is especially glaring with respect to the Eel River. In the California Wild and Scenic Rivers Act (Public Resources Code § 5093.50 *et seq.*, hereinafter "the California Act") the California Legislature unequivocally expressed its intent to reconsider in 1985, or thereafter, the desirability of retaining the Eel River and its tributaries in the California system.[1] This provision of state law raised the legal question whether the Secretary of the Interior could find the requisite permanent administration as to the Eel River. The California Act makes it clear that the Legislature has not committed the State to permanently administer the Eel River in a "free-flowing condition" (16 U.S.C. § 1271) "in such manner as to protect and enhance the values which caused it to be included in [the National] system" (16 U.S.C. § 1281, subd. (a)), as required by 16 U.S.C. Section 1273, subdivision (a)(ii). Petitioners respectfully submit that the Court overlooked this crucial issue and failed to consider it in its decision.

Equally fatal shortcomings precluded any valid finding of National System eligibility for any of the other rivers in the California system. Under the California Act as it existed when the Secretary of the Interior made his deci-

---

[1]Public Resources Code Section 5093.54, subdivision (d), provides in relevant part:

> . . . It is the intent of the Legislature, with respect to the Eel River and its tributaries, that after an initial period of 12 years following the effective date of this chapter [January 1, 1973], the Department of Water Resources shall report to the Legislature as to the need for water supply and flood control projects on the Eel River and its tributaries, and the *Legislature shall hold public hearings to determine whether legislation should be enacted to delete all or any segment of the river from the system.* (Emphasis added.)

sion, the status of all of the rivers was inconsistent with the permanent management requirements of the National Act. As petitioners pointed out below, at the time the Secretary acted, California had not promulgated specific management plans as required by the National Act, the guidelines promulgated under that Act, and past federal agency practice. (See "Memorandum of Points and Authorities In Support of Plaintiffs' Motion for Summary Judgment," filed in the district court in action No. C 81-1457-WAI on May 19, 1981, at pp. 10-15; "Plaintiffs' Reply to Federal Defendants' and Proposed Intervenor's Opposition to Plaintiffs' Motion For Summary Judgment," filed in the District Court in action No. C 81-1457-WAI on June 9, 1981, at pp. 24-27.) The general body of California water and resources law is not a substitute for the permanent management requirements imposed by the National Act. (See "Memorandum Decision" in *County of Del Norte, et al. v. Edmund G. Brown, Jr., et al.*, State of California, County of Sacramento Superior Court action No. 292019 (reproduced in Appendix filed herein by EDF at pp. 6-14), at pp. 5-6 (EDF App. 10-11).)

The state statute as it existed when defendant Secretary acted must be applied to this litigation. (*Bradley v. School Board of City of Richmond* (1974) 416 U.S. 696; Cal. Stats. 1982, Ch. 1481, § 19.) Although these issues have already been pointed out to the Court, they were not independently considered by it. (See discussion at 2., pp. 5-8, *infra*.) Petitioners respectfully submit that rehearing should appropriately be granted for the purpose of such consideration.

2. Rehearing Is Appropriate and Necessary to Allow the Court to Make Its Own Determination of the Legal Issue of Permanent Administration Under State and Federal Law.

Whether or not California has a plan to permanently administer the designated rivers as required by 16 U.S.C. Section 1273, subdivision (a)(ii), is a legal determination

that requires the interpretation of state law and is thus reviewable by this Court is a *de novo* manner. In its Opinion, the Court has failed to make such a review, instead reaching only the issue of whether the Secretary, in making his determination on the issue, had "considered" the state court opinion (Opinion, p. 12, lns. 5-18). In failing to either make its own determination of the substantive legal issue or at least review the legal sufficiency of the Secretary's determination, the Court has "overlooked or misapprehended" an issue of law vital to petitioners' case. These circumstances warrant a rehearing pursuant to Federal Rules of Appellate Procedure, Rule 40.

Under the Administrative Procedure Act (5 U.S.C. § 701, *et seq.*), a reviewing court may make an independent review of legal determinations made by an administrative agency:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions....

(5 U.S.C. § 706.) Where the statute to be construed is not the agency's own enabling statute, or one which the agency has exclusive discretion to interpret, the court "must independently decide the issue raised by" the agency's interpretation. (*I.R.S., Fresno Serv. Ctr. v. Fed Labor Rel. Auth.* (9th Cir., 1983) 706 F.2d 1019, 1023; *State ex rel. Edwards v. Heimann* (9th Cir., 1980) 633 F.2d 886, 888.) Certainly it is within the province of the reviewing court to make its own independent review of a *federal* agency's interpretation of *state* law. (See, *State ex rel. Edwards v. Heimann, supra, id.; Kasey v. Richardson* (4th Cir., 1972) 462 F.2d 757, 759; *Baber v. Schwerker* (D.C.D.C. 1982) 539 F.Supp. 993, 995.)

A river may be added to the National Wild and Scenic Rivers System by the Secretary of the Interior if:

> 1. The State Legislature has designated the rivers as wild, scenic, or recreational rivers;

2. The State has committed itself to permanently administer the rivers as wild, scenic or recreational rivers at no expense to the United States; and

3. "[T]hey are found by the Secretary" to meet the federal criteria for wild, scenic and recreational rivers.

(16 U.S.C. § 1273, subd. (a)(ii).) By the clear wording of the statute ("found by the Secretary"), the Secretary is given some measure of discretion to determine whether a river proposed for Secretarial designation meets the qualitative criteria of National Act[2] and is worthy of inclusion in the National System. In sharp contrast, the National Act contains no discretionary language concerning the first two conditions, *i.e.*, whether the state has designated the river as wild, scenic, or recreational, and whether *state law* contains a program for permanent administration of the river.)

Legislative history underlying the National Act is consistent with this interpretation of the scope of Secretarial discretion under the Act:

> [Under § 1273(a)(ii)] the river must be *found by the Secretary of the Interior* to meet the criteria of the act and be worthy of being included in the system . . . *In addition*, the State must agree that the river will be permanently administered as a scenic river without expense to the United States. . . .

House Report 1623, *U.S. Code Cong. & Admin. News.* (90th Congress Second Session (1968)), p. 3809 (emphasis added).)

The determination of whether the first two conditions set forth above have been met, must be based upon the relevant California statutory and case law, *i.e.*, upon the Cal-

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[2] *I.e.*, to determine whether a river is one "which, with [its] immediate environments, possess[es] outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values . . . [and should] be preserved in free-flowing condition. . . . (16 U.S.C. § 1271.)

ifornia Act (Pub. Res. C. § 5093.50 *et seq.*), and upon the California court's interpretation of it in *County of Del Norte, et al. v. Edmund G. Brown, Jr., et al., supra.* And, where state case law has interpreted the statute in question, that law must be followed, absent exceptional circumstances. (*Mullaney v. Wilbur* (1975) 421 U.S. 684, 691; *Gentry v. McDougall* (9th Cir. 1982) 685 F.2d 322, 323.)

This Court has not made an independent review of the California law as it appears in the statutes and case law raised below by petitioners. Nor has the Court reviewed the sufficiency of the Secretary's legal interpretation of the relevant state law, which directly contradicted the authoritative state case law. Petitioners respectfully submit that these circumstances warrant a rehearing for the purpose of enabling the Court to make its own independent review of the legal issues concerning permanent administration of the rivers.

3. Rehearing Should Be Granted on the Basis That the Court's Opinion Has Overlooked Material Points of Fact or Law, Leading to a Procedural Defect.

The Court has remanded this matter to the District Court with directions "for entry of judgment in favor of defendants." (Opinion, p. 13.) But not all of the grounds upon which petitioners brought their motion for summary judgment have been resolved by either this Court or the District Court. Specifically, petitioners' contentions regarding the inadequacy of the Environmental Impact Statement (EIS) remain unresolved. This Court's opinion thus purports to determine the *entire* action adversely to petitioners, while overlooking vital legal issues which were raised by petitioners and left open for both factual and legal determination by the District Court, and which could entitle them to a favorable judgment. This procedural defect, which denies petitioners their day in court, is sufficient to warrant a rehearing.

Petitioners' motion for summary judgment was based, in substantial part, on their assertion that the Final EIS published by the Secretary of Interior was legally defective for several reasons. (See "Memorandum of Points and Authorities In Support of Plaintiffs' Motion for Summary Judgment," filed in the District Court in action No. C 81-1457-WAI on May 19, 1981, at pp. 17-33.) In its decision, the district court determined that the issues concerning defects in the EIS were not susceptible of resolution on motion for summary judgment, but should instead be resolved at trial. (19 ERC 1138, 1143-1144.) This Court's direction that the District Court enter judgment in favor of appellants in this cause, effectively disposes of a substantial portion of petitioners' case without the trial to which petitioners are entitled. Rehearing should be granted to remedy this procedural defect.

CONCLUSION

For the reasons set forth above, petitioners respectfully request that a rehearing be granted in this cause.

Dated: May 25, 1984.

Respectfully submitted,

Edward J. Tiedemann
Robin Leslie Stewart
Kronick, Moskovitz, Tiedemann
& Girard
A Professional Corporation

By /s/ Edward J. Tiedmann
Edward J. Tiedemann
Attorneys for Appellees/
Petitioners Association of
California Water
Agencies, et al.

Appendix D

In the United States District Court
For the Northern District of California

No. C-81-0567-WAI
No. C-81-1457-WAI

County of Del Norte, et al.,
Plaintiffs,

v.

The United States of America, et al.,
Defendants.

Association of California Water Agencies, et al.,
Plaintiffs,

v.

The United States of America, et al.,
Defendants.

[Filed Feb. 9, 1983]

Memorandum of Decision

Since I issued a Memorandum of Intended Decision on October 15, 1982, intervening parties have made two evidentiary representations. Intervenor Environmental Defense Fund has reported that it can develop testimony in support of a contention that distribution of the Final Environmental Impact Statement to agencies and persons was accomplished by alternative means which rendered the filing of the Haubert declaration superfluous. Intervenor sought to take a deposition in support of this contention. I issued a protective order which, in effect, denied the request on the basis that it was untimely and partakes of a post hoc rationalization.

Intervenor State of California has recently advised of certain amendments to the California Wild and Scenic Rivers Act, one of which deleted the "management plan" requirement. I have not considered this circumstance but the Secretary may wish to do so upon remand.

I. DECISION

For the reasons hereinafter stated, the motion of plaintiffs for summary judgment is GRANTED.

For the purpose of the following discussion, certain abbreviations are sometimes used; F.E.I.S. means Final Environmental Impact Statement; D.E.I.S. means Draft Environmental Impact Statement; CEQ means Council on Environmental Quality; EPA means Environmental Protection Agency; HCRS means Heritage Conservation and Recreation Service; Del Norte Plaintiffs mean the plaintiffs in action No. C-81-0567-WAI; and Water Plaintiffs means the plaintiffs in action No. C-81-1457-WAI.

II. STANDING

Defendants have moved to dismiss these consolidated actions because of plaintiffs' purported lack of standing to maintain their actions, and that by reason thereof this Court lacks jurisdiction of the causes. These motions are supported by intervenors.

Defendants and intervenors contend that plaintiffs are not within the zone of interest protected by NEPA, because with the exception of plaintiffs Scott and Galetz in action No. C-81-0567-WAI, they allege only an economic interest. Defendants and intervenors claim with respect to the two named individual plaintiffs, Scott and Galetz, a lack of standing on the basis that those plaintiffs have alleged only that they "use and enjoy" the rivers, and that the federal designation is not claimed to have impaired that use and enjoyment. Defendants and intervenors set forth the requirements of standing to challenge an agency action

in reliance upon *Western Mining Council v. Watt,* 643 F.2d 618 (9th Cir. 1981), as follows: (1) a particular injury, (2) concretely and demonstrably resulting from defendants' conduct, (3) which will be redressed by the relief sought. They assert that plaintiffs and each of them have failed to demonstrate a particular injury which will be redressed by the relief which plaintiffs seek. In NEPA cases, these stated criteria must include the assertion of an "injury in fact," which is "arguably within the zone of interest to be protected or regulated" by the statute that plaintiff claims the agency violated.

I find that each of the plaintiffs in the consolidated actions have standing. They are within the zone of interest requirement of *Association of Data Processing v. Camp,* 397 U.S. 150 (1970), even though in some cases, notably those of the lumber company and Water District Plaintiffs, the claimed injury is alleged in economic terms. This is so because the claimed injuries (loss of tax revenues and effect upon the physical environment in the affected counties, loss of revenues from the dimunition of lumber industry activities, restriction of timber harvesting on federal lands, impairment of agreements for timber harvesting in national forest, loss of revenues in timber-related interests, loss of ability to plan for adequate facilities to meet future water supply and flood protection, and impairment of ability to furnish water for public water supplies) are alleged to causally result from the agency action falling squarely within NEPA, that is, the federal designation pursuant to the provisions of the *Wild and Scenic River Act,* 16 U.S.C., Section 1271, *et. seq.;* and *Port of Astoria, Oregon v. Hodel,* 595 F.2d 467 (9th Cir. 1979).

Plaintiffs have alleged that they are "adversely affected" or "aggrieved" within the meaning of the Administrative Procedure Act, 5 U.S.C., Section 702. Each plaintiff has adequately alleged perceptible harm by reason of the challenged wild and scenic rivers designation, and by reason

of that I find that injury in fact has been adequately alleged.

Plaintiffs have alleged an injury to themselves that is "likely to be redressed by a favorable decision" *c.f., Village of Arlington Heights v. Metropolitan Housing Development Corporation,* 492 U.S. 252 (1977). This is so even if the redress sought here may not permanently alleviate the injury which plaintiffs apprehend and claim. Plaintiffs have alleged, among other things, procedural defects in the procedures leading to the secretarial designation. These allegations, if made by parties within the required zone of interest, in themselves show sufficient injury and remedial interest to support standing. *City of Davis v. Coleman,* 521 F.2d 661 (9th Cir. 1975).

For the foregoing reasons I deny the motion to dismiss for lack of standing.

III. THE FILING OF THE ENVIRONMENTAL IMPACT STATEMENT WITH THE ENVIRONMENTAL PROTECTION AGENCY WAS DEFECTIVE BECAUSE OF FAILURE OF COMPLIANCE WITH SECTION 1506.10 OF THE CEQ REGULATIONS.

There is no genuine issue of material fact with respect to this issue. The Final Environmental Impact Statement was filed with the Environmental Protection Agency on December 12, 1980. The filing was accompanied by a verification that complete distribution of the Environmental Impact Statement to all agencies and persons was made at that time. (Deposition of O'Neal, p. 6, lns. 17-22.) Plaintiffs received no copy of the statement until December 17, 1980. (Declaration of Cline.) Plaintiffs' counsel received a copy of the E.I.S. on December 17, 1980, the same day that publication was made in the Federal Register. (Declaration of Carlone.) Section 1506.10 of the CEQ Regulations (40 C.F.R., Section 1506.10), provides in substance that publication in the Federal Register shall occur the week follow-

ing the filing of Environmental Impact Statements with the Environmental Protection Agency, and that no decision upon such statements by any federal agency shall be rendered until the latest to occur of two events. These are: (1) ninety days after publication of Notice of Filing of a Draft Environmental Impact Statement; or (2) thirty days after the publications of Notice of Filing of Final Environmental Impact Statement. 40 C.F.R., Section 1506.9 provides in substance that statements shall not be filed with the Environmental Protection Agency earlier than they are also transmitted to commenting agencies and made available to the public. All minimum time periods, including decisions on proposals concerning which Final Environmental Impact Statements have been filed shall be calculated from the time of publication in the Federal Register.

If the provisions of Sections 1506.9 and 1506.10 had been properly complied with, the earliest valid filing date would have been during the week of December 15, 1980, and the earliest publication in compliance with the provisions of Section 1506.10 would have been during the week of December 22, 1980.

If the provisions of those sections had been properly complied with, the secretarial designation involved in this case could not have occurred until on or after January 21, 1981. Because the secretarial decision was rendered on January 19, 1981, it was untimely under the appropriate cited regulations and hence invalid.

While conceding the accuracy of the foregoing, defendants and intervenors contend that the regulations contemplate a public notice period between the publication of the filing of an E.I.S. in the Federal Register and the making of an agency decision within thirty days. They contend that the regulation thus intends a notice period of thirty days, and that more than thirty days ensued between the date of publication in this instance, December 17, 1980, and the

secretarial decision which occurred on January 19, 1981. It is further contended that under the provisions of Section 1506.9, statements were available "on the date of filing of the E.I.S., December 12, 1980." They point out that the deposition of O'Neal reveals that copies of the E.I.S. were available at the H.C.R.S. office on that day. The same deposition reveals that distribution was not completed until December 15, 1980. The verification signed by John Haubert, a representative of the defendant Department of the Interior, states as follows:

> The undersigned also verifies that *complete distribution to all agencies*-persons has been made simultaneous with this filing. (Emphasis supplied.)

Intervenors suggest that in its exercise of equitable powers the Court should weigh the magnitude of what intervenors characterize as an inadvertent violation and the lack of harm suffered thereby by plaintiffs. They sugggest that the purported inadventence caused no substantial harm to plaintiff and that the breach of observance of the regulations should not undo the secretarial decision.

The federal defendants admit that the verification filed by the employee of the Department of the Interior asserting the complete distribution to all agencies-persons had been made simultaneously with the filing was not true. They concede that no copies were available on that date, and that copies were not made available to the public until Monday, December 15, 1980. They agree that publication in the Federal Register ensued during the same week that copies were first made available to the public. They cite the declaration of Speth and the affidavit of Knight to the effect that the purpose of Sections 1506.9 and 1506.10(b)(2) are satisfied if the E.I.S. is available for public review for thirty days following publication in the Federal Register. They further rely on the statement of Speth to the effect that the "preceding week" phrase as used in Section 1506.10 is not in-

tended to enlarge the thirty day period. That section provides for public and agency review of an E.I.S. Federal defendants contend that the Speth interpretation is reasonable and should be given substantial deference.

The Speth interpretation is at odds with the plain wording of the regulation. Agency expertise is not necessary to interpret the standard meaning of plain English.

It is conceded that the false verification was negligent, but contended that it was not made with the intent to undermine the public review process, and that the calculation of the thirty day waiting period from December 17 should therefore be deemed a trivial violation since a thirty day review period was provided.

Federal defendants also contend together with intervenors, that plaintiffs and no one else have shown any harm by reason of the failure to observe the time periods set forth in the regulations. Federal defendants suggest that the relief sought by plaintiffs is punitive and may therefore not be granted, *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017 (9th Cir. 1980), and that the rule of harmless error applies.

In *Buschmann v. Schweiker*, 676 F.2d 352 (9th Cir. 1982), the Ninth Circuit reiterated that in administrative proceedings procedural safeguards which assure public access to a decision-maker should be vigorously enforced. In that case, the court found some complication in the application of the rule of prejudicial error as set forth in 5 U.S.C., Section 706, to a situation where prejudice could not be clearly inferred. Even so, the court invalidated the agency action because of the importance of failure to comply with notice and comment procedure.

It ill-becomes the federal defendants and the intervenors to characterize as trivial that which admittedly arises from the false verification of an employee of the defendants Department of the Interior. Much has been made in this case

of the undue haste allegedly motivated by political considerations which plaintiffs claim characterize this entire designation process. Without assessing motivation, I think that the E.I.S. was prepared with requisite objectivity as will appear *infra*, however, it must be conceded that an inference may arise in this matter that the admitted false verification was undertaken to achieve an early Federal Register publication and subsequent secretarial designation. Citizens interested in agency matters such as this should not have their procedural rights affected by acts of governmental falsehood even if inadvertently committed. Admitted false verification in and of itself in the Court's view, provides a sufficient actual harm to plaintiffs to justify entry of summary judgment.

IV. ADEQUACY OF COMMITMENT OF STATE OF CALIFORNIA TO PERMANENTLY ADMINISTER RIVERS, 16 U.S.C., SECTION 1273(a)(ii)

Plaintiffs are entitled to summary judgment on the issue of whether the state of California responsibly demonstrated that the designated rivers "are to be permanently administered as wild, scenic or recreational rivers by an agency or public subdivision of the state . . ."

The Secretary's decision approving the designation is a substantive one, and therefore is subject to judicial reversal only if it constitutes an abuse of discretion or is contrary to law, *Latham v. Brinegar*, 506 F.2d 677 (9th Cir. 1974), *American Petroleum Inst. v. Knecht*, 609 F.2d 1306 (9th Cir. 1979).

In enacting the California Wild and Scenic Rivers Act, Pub. Res. Code, Section 5093.50, *et seq.*, the California Legislature specifically addressed the fashion in which designated rivers are to be managed, by requiring the submission for its consideration of a management plan of administration of each river and its adjacent land area

in accordance with its classification. Pub. Res. Code, Section 5093.85. The Legislature specifically reserved to itself the power of approval of management plans so submitted.

Thus, the question of the management of the rivers has been directly and specifically considered by the Legislature, which requires a plan specifically designed for river management to be evolved and developed after hearing.

In *County of Del Norte v. Brown*, Superior Court, Sacramento County, No. 292019, a final judgment, the Court held that neither the Governor of California nor the State Secretary of the Resources Agency has the legal power to commit the state of California to permanently administer the rivers in question within the meaning of 16 U.S.C., Section 1273(a)(ii), in the absence of Legislative approval of the management plan required by the State Act. That court recognized that the United States Secretary of the Interior has authority to determine the question of permanent administration within the meaning of the Federal Act, but should do so in light of the court's interpretation of the California Act. (Conclusion of Law, No. 7.)

The secretarial issue document draws attention to *Del Norte, supra*, but concludes that the statutes and other materials set forth in Appendix E to the F.E.I.S. provide an adequate program of action for permanent administration within congressional intent. It does not disclose to the Secretary the California court's admonition that the federal evaluation should be conducted in the light of the court's interpretation of the California Act.

It may well be that the program of action set forth in Appendix E, which is comprehensive, is within the objectives held by Congress in its enactment of the Wild and Scenic Rivers Act. The program is more detailed and

comprehensive than plans submitted and approved with respect to the applications for designation of the Upper and Lower Little Miami River, New River, the Lower St. Croix and Little Beaver Creek. In those cases, however, there was no question of the legal right to make the representation of the ability and willingness to permanently administer the rivers.

When a state court has determined that the state has no legal right to make representation because of non-compliance with state law, I think that the Secretary of the Interior needs to consider whether a necessary and relevant precedent to his exercise of discretion has been lawfully fulfilled.

The California Wild and Scenic River Act is the primary basis for consideration in addressing the adequacy of the state's commitment. The Governor's commitment must be evaluated in light of that Act and its requirements, because it is a specific statute dealing with the will of the California Legislature with respect to wild and scenic rivers.

The obligation to administer is not that of the Federal Government; it is the obligation of the state. It was the intent of Congress that the state making application for designation "agree" to permanently administer the rivers for which designation is sought. *U.S. Code Cong. & Ad. News*, 90th Cong., 2nd Sess. 3809.

Agreement to administer is an obvious necessary precedent to any exercise of secretarial discretion, and is a relevant factor to be considered in the secretarial decision.

As pointed out in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), this Court must consider (1) whether the Secretary acted within statutory authority; (2) whether the secretarial decision was based upon a consideration of relevant factors; and (3) whether the Secretary's action followed the necessary procedural require-

ments. The third of those considerations has been determined adversely to defendants. (Section III, *supra.*) While it is clearly within secretarial discretion to evaluate the adequacy of a state's program of action in accordance with the standards of the Act and administratively developed criteria, the Secretary must consider all relevant factors, including as in this case, the method that the state has chosen to designate its rivers. Implicit in such a relevant consideration are the statutes of the state and judgments interpreting them. While the *Del Norte* decision was drawn to the Secretary's attention by the Secretarial Issue Document (a part of the administrative record) its full import was not set forth, and secretarial consideration may thereby have been unduly limited.

This Court may not make the judgment which is the Secretary's, but it can assure consideration by the Secretary of all factors relevant to that judgment by ordering remand to the Secretary. Remand is appropriate in this instance.

V. DEFICIENCIES IN F.E.I.S.; INSUFFICIENT OPPORTUNITY FOR COMMENT; SUBSTANTIALLY NEW AND DIFFERENT MATERIAL IN F.E.I.S.; OF ALTERNATIVES OF IMPACT; FAILURE OF CONCURRENT PREPARATION WITH ONGOING FOREST SERVICE MANAGEMENT PLANNING; FAILURE TO ADEQUATELY DESCRIBE IMPACTS OF ALTERNATIVES WHICH WERE CONSIDERED; BIASED AND MISLEADING COMPARISON OF ALTERNATIVES.

None of the above issues are susceptible of resolution on motion for summary judgment.

As pointed out by intervenor State of California, I have already held, by virtue of the Order of December 1, 1980, denying application for preliminary injunction, that defendants did not act improperly in closing the comment period on the D.E.I.S. after the elapse of sixty days. The

declarations of Menton and Blanchard support the notion that the comment period was adequate.

County of Josephine, supra, considered the matter of undue haste, and while that is a subject of arguable merit, I cannot say on consideration of a motion such as this that a lack of objectivity is inferable or decisive on the basis of haste. Political motivation is irrelevant unless a failure of objectivity is apparent. As stated above, motivation may be relevant to the unconscionable failure of H.C.R.S. to observe applicable rules in the executing of the required statement verification of distribution at the time that the F.E.I.S. was filed.

There is no effective evidentiary showing on the part of plaintiffs demonstrating prejudice by the use in the F.E.I.S. of representative samples or summary of comments. Cf. *Save Lake Washington v. Frank,* 641 F.2d 1330 (9th Cir. 1981). If such prejudice is capable of demonstration, it may be done at trial.

The declarations of Cheryla Karpowicz and Donald Asquita stand in stark contrast to those of Barbara Jo Talley, Charles Pike, Stephen McCalley, Stephen Kasower, Joseph Menton, Karl Haugh and Arthur Godwin with respect to the contentions that the F.E.I.S. impermissibly contained material not included within the D.E.I.S., and that by reason of that variance important issues escaped scrutiny and comment. Obviously, the modality of summary judgment is inappropriate for resolution.

It cannot be said, as a matter of law, that an F.E.I.S. is insufficient because it is not prepared concurrently with ongoing management planning by another agency, in this instance the Forest Service. *National Helium Corp. v. Morton,* 486 F.2d 995 (10th Cir. 1973).

Consideration of other reasonable alternatives, such as congressional designation, is not fatal to the F.E.I.S. on the showing now before me. The declaration of TALLEY

indicates that in fact that alternative was thoroughly considered. Federal defendants properly rely upon *Sierra Club v. Hodel*, 544 F.2d 1036 (9th Cir. 1976).

It is not impermissible in my view, on the subject of the *classification* of rivers and segments thereof, to select the most restrictive classification for the purpose of evaluation of impact. Nor are the preparers of the F.E.I.S. required to weigh classification in terms of prognostication of future conditions. *Citizens Against Toxic Sprays v. Bergland*, 428 F. Supp. 908 (D. Ore. 1977). The Water Plaintiffs contend that the alternative of designating only the lower American River because its management is now fixed as recreational, while designation of the other four rivers should properly await the adoption of management plans. This is not an issue which I can resolve now.

With respect to the contentions that impact of the alternatives presented are not adequately presented, I cannot say that the F.E.I.S. reliance on the report of the California Energy Commission which is said to be impermissably [sic] uncritical, or that the factors set forth in the declaration of Teerink with respect to the preclusion of water development require a summary resolution. These are complex issues of great moment to the future well being of California. The only appropriate vehicle of resolution is trial.

The same may be said with respect to contentions of the Del Norte Plaintiffs on the subject of timber management. The resolution of issues such as the adequacies of F.E.I.S. discussion regarding the effect of restrictive timber harvesting water quality, fisheries and mining, is inappropriate for summary judgment. For the purposes of this aspect of the motion, I am inclined to believe that federal defendants adequately raise a triable issue of material fact when they raise the "rule of reason" standard as set forth in *Trout Unlimited v. Morton*, 509 F.2d 1276 (9th

Cir. 1974). Furthermore, intervenor California suggests that extensive discussions of water needs beyond the year 2000 may be impermissibly speculative, and hence not properly includable within the scope of the F.E.I.S.

Counsel for plaintiffs shall prepare a form of judgment and submit it to counsel for defendants and counsel for intervenors for approval as to form.

DATED: 2-11-83.

/s/ WILLIAM A. INGRAM

WILLIAM A. INGRAM
United States District Judge

Appendix E

In the United States District Court
For the Northern District of California

No. C-81-0567 WAI

County of Del Norte, County of Humboldt,
Del Norte Unified School District,
The Eureka Chamber of Commerce,
The Pacific Lumber Company, Simpson Timber Company,
Miller Redwood Company, Big Flat Lumber Company,
The Western Timber Association,
The California Forest Protective Association,
David Scott and David W. Galitz,
Plaintiffs,

vs.

The United States of America,
The Department of the Interior,
The Heritage Conservation and Recreation Service and
James G. Watt, Secretary of the
Department of the Interior,
Defendants.

State of California, Environmental Defense Fund,
Sierra Club, California Trout, and
Save the American River Association,
Intervenors.

No. C-81-1457-WAI

Association of California Water Agencies,
Antelope Valley-East Kern Water Agency,
Castaic Lake Water Agency,
Coachella Valley County Water District,
Crestine-Lake Arrowhead Water Agency,
Desert Water Agency, Kern County Water Agency,
The Metropolitan Water District of Southern California,
Mojave Water Agency,
San Bernardino Valley Municipal Water District, and
San Gabriel Valley Municipal Water District,
Plaintiffs,

vs.

The United States of America;
The Department of the Interior; and James G. Watt,
Secretary of the Department of the Interior,
Defendants.

State of California, Environmental Defense Fund,
Sierra Club, California Trout, and
Save the American River Association,
Intervenors.

[Filed Mar. 24, 1983]

JUDGMENT

This cause came on to be heard on the motions of the plaintiffs for summary judgment declaring that the January 19, 1981 action of former Secretary of the Interior, Cecil D. Andrus, to include portions of the Smith, Eel, Klamath, Trinity and Lower American Rivers and their tributaries in the National Wild and Scenic Rivers System was illegal and void and on the motions of the defendants and intervenors that the actions be dismissed, or in the alternative, summary judgment be granted to defendants and intervenors, on the ground that plaintiffs lacked standing to prosecute their actions. The Court having considered

the pleadings, affidavits and memoranda submitted by the respective parties and the argument of counsel, and having issued its Memorandum of Decision on February 11, 1983, determining that defendants and intervenors are not entitled to dismissal or summary judgment and that plaintiffs are entitled to summary judgment:

IT IS ORDERED, ADJUDGED AND DECREED that the January 19, 1981 action of former Secretary of the Interior Cecil D. Andrus to include portions of the Smith, Eel, Klamath, Trinity and Lower American Rivers and their tributaries in the National Wild and Scenic Rivers System is illegal and void and that this matter is remanded to the Secretary of the Interior for further consideration in light of this Court's Memorandum of Decision and this judgment.

Dated: 3/24/83

/s/ WILLIAM A. INGRAM

William A. Ingram
United States District Judge

Appendix F

Exhibit F

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United States District Court for the
Northern District of California

No. C-81-1457-WAI

Association of California Water Agencies,
Antelope Valley-East Kern Water Agency,
Castaic Lake Water Agency,
Coachella Valley County Water District,
Crestline-Lake Arrowhead Water Agency,
Desert Water Agency, Kern County Water Agency,
The Metropolitan Water District of Southern California,
Mojave Water Agency, San Bernardino Valley
Municipal Water District, and San Gabriel Valley
Municipal Water District,
Plaintiffs,

v.

The United States of America;
The Department of the Interior; and James G. Watt,
Secretary of the Department of the Interior,
Defendants.

Declaration of John R. Teerink

I, JOHN R. TEERINK, do hereby declare and testify as follows:

1. I am a civil engineer registered to practice in the State of California and am currently associated with

Bookman-Edmonston Engineering, Inc. I served as Director of the Department of Water Resources (DWR) of the State of California from 1973 to 1975 and as Deputy Director of that Department from 1967 to 1973. I was employed in various planning, management and other capacities in that Department, which operates California's State Water Project (SWP), for a total of 28 years. I am personally familiar with the matters discussed within this declaration and would be competent to testify with respect thereto at the trial of this action.

2. I have reviewed both the Draft Environmental Impact Statement ("DEIS") and the Final Environmental Impact Statement ("FEIS") prepared by the U.S. Department of the Interior, Heritage Conservation and Recreation Service on designation of five California rivers as part of the National Wild and Scenic Rivers System.

3. *Failure to Describe Costs.* The FEIS fails to fairly or fully describe the costs associated with precluding proposed flood control and potential hydroelectric generation on the designated rivers, and understates net water project benefits identified in Alternatives A and C by $543 million as more fully described below. A corrected tabulation of the water projects portion of Table 33 of the FEIS for those two alternatives, together with the respective FEIS values, are attached as Exhibit A.

4. *Flood Control Benefits Lost.* The FEIS fails to identify important documented flood control benefits for the proposed Dos Rios Project in the following respects:

a. It ignores the loss of at least $50 million in flood control benefits caused by precluding multi-purpose water project development on the designated rivers. It classifies as "unknown" important flood control benefits associated with the proposed Dos Rios Project (page IV-158), although the United States has docu-

mented them in a formal report[1] that the FEIS references (page VII-9). That report identifies the equivalent average annual flood control benefits provided by Dos Rios Dam as $1,510,000 (1968 Report, page 61). Since that value is based on 1967 cost levels, its 1980 value would be $3,730,000 based on a Consumer Price Index (CPI) increase of 247 percent.[2]

b. The flood control benefits listed for Alternatives A and C in Table 33 of the FEIS should therefore be $50,355,000. That Table represents the National Economic Development Account summary for the alternatives considered and thus purports to show the present value over 100 years, of the respective costs and benefits of those alternatives. The $50,355,000 figure is determined by converting the average annual benefit ($3,730,000) to present value over a 100-year period, based on a 7⅜ percent interest rate required multiplication by a factor of 13.5.

c. Even the $50,355,000 figure seriously underestimates flood control benefits foregone, because it relates only to the Middle Fork of the Eel River and does not address flood control benefits lost by precluding multipurpose water resource developments on the other designated rivers.

d. The FEIS also ignores the fact that additional downstream levee protection on the Eel River depends to a large extent on construction of a Dos Rios Dam since physical factors limit levee protection capacity to 600,000 cfs. Construction of major downstream

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[1]U.S. Army Corps of Engineers. *Interim Report on Water Resources Development for Middle Fork Eel River.* Washington, D.C.: Government Printing Office, April 1968. (Hereafter "1968 Report".)

[2]The Engineering News-Record Building Code Index increase is 290 percent for the same period, and the Construction Cost Index increase is 304 percent.

levees as the sole flood control device has not been considered feasible because the 1964 flood on that river had a peak flow of 840,000 cfs. However, the flood control protection provided by Dos Rios Reservoir would reduce maximum downstream flows to about 600,000 cfs, thus making downstream levee projects feasible. (1968 Report, pages B-2, E-3, 40 and 41.)

5. *Hydropower Benefits Lost.* The FEIS also fails to identify important hydroelectric benefits that the designation precludes by:

a. Failing to consider significant costs of foreclosing future hydroelectric power projects on the designated rivers, although one of the FEIS references (page VII-3) documents the potential hydroelectric energy capability of the designated rivers as approximately 16 billion kilowatt hours per year.[3] The only aspect of hydroelectric generating loss that the FEIS considers is the 0.042 billion kilowatt hours associated with the 1968 Dos Rios Project proposal for a 4800 kilowatt generator. (Page III-12; 1968 Report, pages 63, E-27.)

b. Comparing the 1968 Dos Rios Project hydroelectric benefits in a misleading and inaccurate manner by updating project costs for inflation without similarly updating hydroelectric benefits. It updates the 1968 Dos Rios Project costs from $438 million (1968 Report, page 60) to $1,325 million, an increase of 303 percent (page IV-158). But it does not apply the same inflation factor to the hydroelecrtic benefits. If it had, those benefits would be $8.8 million, rather than the $2.9 million listed in Table 33 (page IV-158).

c. Basing its use of a $2.9 million hydroelectric benefit valuation on seriously understated costs of an

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[3]California Department of Water Resources. Bulletin 194 *Hydroelectric Energy Potential in California*. Sacramento: State Printing Plant, March 1974, page 10.

assumed "least cost, most likely alternative." It assumes that alternative would be a geothermal plant built in the year 2000 (page IV-150) with a unit cost of $604 per kilowatt ($2,900,000/4,800 kw). However, even DWR's current geothermal project (Bottle Rock Project) has significantly higher costs. It has a capacity of 55 megawatts and an estimated cost by the time the project is completed in 1984 of $108 million, representing a unit cost of $1,964 per kilowatt. Capacity is valued at $174 per kilowatt-year and energy is valued at 45 mills, for an equivalent total power value of 71 mills. By the year 2000, those figures could be significantly higher depending on cost escalation over the 16 years following the 1984 project completion.

d. Failing to update the 1968 estimate of Dos Rios hydropower benefits to current market conditions. Because of the drastic change in the national energy situation, the values of $18.43 kilowatt-year for capacity and 3.06 mills per kilowatt-hour for energy assumed in 1968 (1968 Report, page B-27) are totally imappropriate [sic] today. A value of 50 mills for energy is more appropriate now based on the use of imported oil in oil-burning power plants, and a value of about $80 per kilowatt-year could be used for capacity. Applying these values to the small 1968 Dos Rios power project would give the following results:

Capacity:	4,800 Kw × $80 =	$ 384,000
Energy:	42,000,000 Kwhr × $.05 =	2,100,000
Annual Total		$2,484,000

The present value of this amount over 100 years at 7⅜ percent would be 13.5 times this amount, or $33,534,000, rather than the $2,900,000 valuation carried in Table 33 (page IV-158), or the $8,787,000 inflation-corrected valuation.

e. Ignoring the possibility of producing power from Dos Rios water exported to the Sacramento Valley, as described in reports referenced in the FEIS

(pages VII-3, 9; 1968 Report, page 46; DWR Bulletin 172,[4] Appendix, Supporting Studies page 7). Those references were prepared before 1970 and classified that power potential as economically marginal on the basis of energy markets that were many times lower than they now are. However, the current annual value of that power potential is estimated as at least $40 million with a present value over 100 years (at 7⅜ percent) of at least $540 million. This is based on 750,000 acre-feet average annual diversion from the proposed Dos Rios Project (amount diverted equals storable inflow less allowance for evaporation; DWR Bulletin 172,[5] Appendix Supporting Studies) which represents a uniform annual flow of 1,038 cfs. If this flow produced electric power over a 1,000-foot elevation drop from the Eel River to the Sacramento River at least 77 megawatts of capacity would be provided even if no allowance was made for peaking. That same flow and elevation drop would provide two to three times that amount if peaking were included. Furthermore, it would produce about 676 million kilowatt-hours of energy a year. Since the total elevation drop from Dos Rios to the Sacramento River is 1,500 feet, the 1,000-foot drop assumption is conservative.

6. *Ignores Water Supply Risks.* The FEIS also fails to fully or fairly describe significant risks caused by precluding water supply development on the designated rivers, by assuming that that water supply will not be needed to meet California's future water supply needs. It bases that assumption on controversial water demand projections in DWR Bulletin 76 (page VII-4) that cover only the next nineteen years (page III-14) and on future findings of

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[4]California Department of Water Resources. Bulletin 172 *Eel River Development Alternatives*. Sacramento: State Printing Plant, December 1969. (FEIS, page VII-3.)

[5]Ibid.

feasibility for, and construction of, projects that would develop alternative water supplies (pages IV-58, 59).

a. That failure is significant because the designated rivers constitute 30 percent of California's natural annual water supply and provide average annual flows of approximately 20 million acre-feet of fresh water. Furthermore, the state has filed several water rights applications over the years, to reserve important amounts of water from the designated rivers for future water supply development (pages III-4 to 11, IV-52, 53).

b. The SWP is particularly sensitive to difficulties in developing future public water supplies because it has developed only half of the 4.23 maf annual supply that the state has contracted to deliver to communities in central and Southern California over at least the next 40 years. Two-thirds of the state's population currently resides within those communities and a quarter of the state's lands is located within the SWP service area. Indeed, the legislation authorizing the SWP and the SWP water service contracts expressly incorporate the designated north coast rivers as possible sources for the additional water supplies needed to fulfill the state's water delivery obligations under its SWP contracts.

c. It is not now possible to determine the feasibility of the Eel River or the other designated rivers, as alternative sources for the additional water supply that the SWP will need to meet its water service contracts after the year 2000. The information needed to make that determination will not become available until feasibility studies are completed on other additional water supply facilities described in DWR Bulletin 76.

d. Except for the Peripheral Canal, DWR's Bulletin 76 does not represent a final decision to construct the recommended additional water supply facilities or to undertake the recommended programs. Those recommended facilities and programs must still be subjected to engineering, economic, environmental and financial feasibility studies and must receive respective findings of feasibility. Some of the alternatives would consume large amounts of electrical energy in a time of uncertain, but rising power costs. Although the construction of some of the facilities and implementation of programs recommended by Bulletin 76 have been conditionally designated by the Legislature in a bill identified as SB 200 and enacted as Chapter 632 of the Statutes of 1980, the effective date of that Act has been stayed pending a statewide referendum vote.

e. The proposed enlargement of Shasta Dam and Reservoir (page IV-59) does not, at this time, represent a tangible SWP water supply alternative because studies of that proposal have just been authorized by Congress and funding is currently very limited. The studies may not begin until 1982, and the proposal will eventually require congressional approval. The studies will continue for at least five years, with completion not expected before the end of 1986. Even if those studies result in a finding of feasibility, statutory authorization would still have to be obtained from Congress for actually constructing the project.

Executed under penalty of perjury in Sacramento, California, on May 19, 1981.

/s/ JOHN R. TEERINK

John R. Teerink

Excerpt of Water Project Effects Portions of FEIS Table 33

National Economic Development Account
Present Worth of Potential Average Annual Effects on National Income
(All Figures Given in Thousands of 1980 Dollars)

	As Published in FEIS		As Corrected	
	Alternative A No Rivers Included	Alternative C Exclude Middle Fork Eel River	Alternative A No Rivers Included	Alternative C Exclude Middle Fork Eel River
Water Projects				
Beneficial Effects (Value of water and power)				
Electric power				
Downstream releases	2,900	2,900	33,534	33,534
Export water			539,460	539,460
Water supply	1,116,000	1,116,000	1,116,000	1,116,000
Flood Control	Unknown	Unknown	50,355	50,355
Subtotal	1,118,900	1,118,900	1,739,349	1,739,349
Adverse Effects (Cost of water projects)	1,325,300	1,325,300	1,402,300*	1,402,300*
		76,700		76,700
Subtotal		1,402,000		1,479,000
Net Water Project Effects	—206,400	—283,100	337,049	260,349

*Includes additional cost for power facilities

Appendix G

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Attorneys for Plaintiffs, Association of
California Water Agencies and Kern County Water Agency

(Attorneys for other Plaintiffs are listed on next page.)

United States District Court for the
Northern District of California

No. C-81-1457-WAI

Association of California Water Agencies,
Antelope Valley-East Kern Water Agency,
Castaic Lake Water Agency, Coachella Valley County
Water District, Crestline-Lake Arrowhead Water Agency,
Desert Water Agency, Kern County Water Agency,
The Metropolitan Water District of Southern California,
Mojave Water Agency, San Bernardino Valley
Municipal Water District, and San Gabriel Valley
Municipal Water District,
Plaintiffs,

v.

The United States of America; the Department of the
Interior; and James G. Watt, Secretary of the
Department of the Interior,
Defendants.

State of California,

Defendant in Intervention.

[Filed June 26, 1981]

Supplemental Declaration of John R. Teerink

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I, JOHN R. TEERINK, do hereby declare and testify as follows:

1. I am a civil engineer registered to practice in the State of California and am currently associated with Bookman-Edmonston Engineering, Inc. I served as Director of the Department of Water Resources (DWR) of the State of California from 1973 to 1975 and as Deputy Director of that Department from 1967 to 1973. I was employed in various planning management and other capacities in that Department, which planned and which now operates California's State Water Project, for a total of 28 years. I am personally familiar with the matters discussed within this declaration and would be competent to testify with respect thereto at the trial of this action.

2. The State of California enacted the California Water Resources Development Bond Act, commonly known as the Burns-Porter Act (Water Code § 12930, et seq.) in 1959. The Burns-Porter Act, which was subsequently approved by the voters of the State of California, provided for the development, financing, and construction of the State Water Resources Develpment [sic] System, now generally known and referred to as the State Water Project. (SWP)

3. The Burns-Porter Act provided for the immediate construction of a multiple purpose dam and reservoir on

the Feather River in the vicinity of Oroville, California, certain upstream dam and reservoirs, a described aqueduct system, levees, control structures, channel improvements, and appurtenant facilities in the Sacramento-San Joaquin Delta, and drainage, power and other related facilities. (See California Water Code § 12934, subd. (d).) The Act also provided for the development of additional facilities as needed to augment the supplies of water in the Sacramento-San Joaquin Delta "from multiple purpose dams, reservoirs, aqueducts and appurtenant works in the water sheds of the Sacramento, Eel, Trinity, Mad, Van Duzen, and Klamath Rivers for use in the State Water Resources Development System. . . ." (California Water Code § 12938.)

4. Pursuant to the Burns-Porter Act (California Water Code § 12937), DWR entered into long-term water supply contracts with many local water agencies throughout California. (See Exhibit A attached hereto, a copy of the Contract entered into by the State of California and the Metropolitan Water District of Southern California, as amended February 1, 1973, which contract is a prototype of these water-supply contracts.) Under these contracts DWR has promised to deliver annually-increasing amounts of water over the term of the contracts. The contracts specifically incorporate by reference California Water Code § 12938, noted above, which provides for additional multiple purpose dams, reservoirs, aqueducts and appurtenant works as necessary in the watersheds of the Sacramento, Eel, Trinity, Mad, Van Duzen and Klamath Rivers. These additional watersheds were included to prevent any reduction in the minimum yield of the SWP. (See Exhibit A attached hereto, at page 8, Art. 1(h).)

5. Prior to the execution of the water supply contracts, the State Director of DWR transmitted to the Governor a report of Dillon, Read & Company, Inc. on the plan to develop, finance and construct the SWP. The Dillon-Read

report along with the Director's letter of transmittal (attached hereto as Exhibit B) evidences that the SWP included the Eel River as a potential additional source of water development.

6. On March 9, 1964, the then Director of DWR authorized the Upper Eel River Development as an additional facility of the State Water Resources Development System and the SWP. This development "has been officially selected and legally identified as the first of the additional project water conservation facilities which will maintain the minimum project yield of the State Water Project." (See Exhibit C attached hereto, DWR Bulletin 132-65, p. 58.) As authorized, the Upper Eel River Development would consist of Spencer and Franciscan Dams, Spencer reservoir, and Dos Rios Dam and reservoir, or alternatives thereto, on the Middle Fork Eel River in Mendocino County.

7. To date, the State of California has completed facilities which provide approximately one-half of the water supply required to meet the minimum SWP yield which is defined under the water supply contracts as approximately 4,230,000 acre feet per year. (Exhibit A, at page 9, Art. 1(m).) While that one-half supply meets the current water delivery obligations, it will not be able to meet water delivery requirements after the early 1980's, if historical dry period conditions reoccur. (See Exhibit D attached, which is excerpted from DWR Bulletin 132-80, at page 15.)

8. The water supply contracts are based on a "staged" development concept that schedules the construction of additional water supply facilities, as they are needed, to provide the respective increments of water supply required as contract delivery entitlements increase to stipulated maximums in future years. The water supply contracts classify the SWP facilities needed to meet full water delivery obligations, as "transportation facilities" and "conservation (water supply development) facilities." The "conservation facilities," in turn, are classified as "initial

project conservation facilities" and "additional project conservation facilities." The "additional" project conservation facilities are, as discussed above, defined in the plaintiffs' contracts as those facilities which are provided for in California Water Code § 12938, to serve the purpose of preventing a reduction in the minimum project yield. Plaintiffs are obligated to repay a proportionate share of all the project water supply costs for the above-described facilities on an annual basis. Plaintiff water districts' and agencies' payments to the State in 1980 exceeded $135 million, and those payments will increase substantially in future years. (See Exhibit E attached hereto, which is excerpted from DWR Bulletin 132-80, at pages 306-309.) The largest part of these charges is based upon the respective maximum contract entitlements in the Plaintiffs' contracts, irrespective of the amount of water actually delivered.

9. The prototype water supply contract between the State of California DWR and the Metropolitan Water District of Southern California provided that Metropolitan Water District would pay for costs incurred by DWR in connection with the study and development of the Eel River as a potential additional water source. (See Exhibit A at pages 23-24, Art. 22(e).) Metropolitan Water District has paid no monies for such costs incurred by DWR.

10. The State of California has completed all of the initial project conservation facilities with the exception of a Delta water transfer facility; and the Legislature has directed the Department of Water Resources to build the Peripheral Canal as that facility. Consequently, the Peripheral Canal represents the next increment of project water supply; and the State is not expected to decide on the construction of the first additional project conservation facility until after the Peripheral Canal project is underway.

11. The State of California's decision to construct any additional project conservation facility requires a full, contemporaneous evaluation of the alternative water supply sources, and particularly of their environmental, engineering and economic feasibility. Consequently, Bulletin 76, cited extensively by declarant Ronald B. Robie in Exhibit 12 to Intervenor's Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Summary Judgment, does not purport to represent a final decision to construct any of the additional water supply facilities or to complete any of the programs discussed therein.

12. In addition, Bulletin 76 does not purport to identify the total additional SWP water supply that will eventually be needed to provide the full 4.23 million acre-feet. Instead it outlines alternatives to be evaluated to meet the State's estimate of local needs in the year 2000, and not the contract delivery schedule entitlements. Furthermore, Bulletin 76 improperly assumes that local water conservation and wastewater reclamation programs will reduce the State's water delivery obligations to plaintiff agencies and districts. Such local programs would not constitute additional SWP water supply under the terms of the water supply contracts, but would be additional water supplies available to plaintiffs districts and agencies independent of the SWP contract delivery obligations.

Executed under penalty of perjury in Sacramento, California on June 25, 1981.

/s/ JOHN R. TEERINK
John R. Teerink

State of California
Department of Water Resources [Letterhead]
Sacramento

October 26, 1960

Honorable Edmund G. Brown
Governor of California
State Capitol
Sacramento, California

Dear Governor Brown:

I transmit herewith (a) an analysis of the financial feasibility by Dillon, Read & Co., Inc., of New York, and (b) an analysis of the engineering feasibility by Charles T. Main, Inc., of Boston, of the State Water Project to be financed by the California Water Resources Development Bond Act (S. B. 1106).

In brief, the consultants' reports state that the water program is feasible from an engineering standpoint, that the water is needed, that the needs will increase, that the program will produce sufficient water to meet the needs, that the funds are adequate to complete the program including not only the Oroville Dam but also the Eel River development, and the costs can be repaid by the water users on the basis of present day costs. They further conclude that the bonds can be sold at a reasonable interest cost, and that their sale will not adversely affect the State's financial position.

The consultants point out that material inflation is a risk in any program of this magnitude extending over such a long period of time, and a risk which the State must be prepared to assume. Obviously, further delay in construction can only accelerate the ultimate cost.

You will note that in their analyses the consultants indicated that their legal counsel, contrary to the opinion of our own attorneys, question the surcharge provision. In this connection I would only point out that the Legislature, if it so desires, may eliminate any question on this matter at the next regular session in 1961.

The engineering feasibility report contains one new element which I consider to be of importance. The consultants have pointed out that there will be funds available within the bond authorization to permit construction of the first storage unit on the North Coast on the Middle Fork of the Eel River. This will mean that even after full allowance for area of origin needs there will be sufficient water available to meet project demands, well beyond the middle of the next century, of those areas within the project service area to which water must be exported.

In closing, I would like to say that the consultants have been most thorough in their analyses and diligent in their investigations. Thus, it is with pleasure that I transmit their reports to you with the knowledge that their publications will result in a broader awareness of the water crisis we face and will impress the public with the urgent necessity of favorable action on Proposition One, and with the fact that we should start construction at the earliest possible time.

Very truly yours,

/s/ HARVEY O. BANKS
Harvey O. Banks
Director

Enclosures

Report of Financial Consultants To State of California Department of Water Resources On Financial Aspects of Program for State Water Resources Development System

Dillon, Read & Co. Inc.
New York, N.Y.

October 26, 1960

INTRODUCTION

This is our second and last report under our contract, dated February 18, 1960, with the State of California Department of Water Resources (the "Department"). Our interim report under this contract was submitted July 8, 1960.

Our contract provides that this report shall contain conclusions with respect to certain matters bearing on the financial aspects of the State's water program, including particularly the financial soundness and financial feasibility of the program. We are advised by the Department that, in its opinion, the submission by us of this report constitutes fulfillment of the work assigned to us by the contract.

At the time of our interim report, the State's water program had undergone substantial revisions, and the necessary engineering studies were still in progress. Therefore, it was not possible at that time to arrive at even preliminary conclusions with respect to a number of the matters to be covered by us, particularly with respect to the

adequacy of revenues of the program to pay the expenses and financial charges. Our present report covers such matters as well as those discussed in our interim report, and completely supersedes that report.

Our reports have been coordinated with the interim (July 8, 1960) and final (October 18, 1960) reports of Chas. T. Main, Inc. (the "Consulting Engineers"), retained by the Department as engineering consultant; and with the findings of Coverdale & Colpitts and of Dr. D. Wynne Thorne and Associates, retained by the Consulting Engineers as advisers on certain matters. We have worked closely with the Consulting Engineers and have enjoyed their full cooperation. The estimates contained herein of construction costs, water supply and demand, water deliveries, and revenues and expenses are those of the Consulting Engineers. Of necessity, the preparation of portions of our present report has awaited the completion of their studies and of their final report.

We have also worked closely with, and have enjoyed the full cooperation of, the Department and various other State offices and departments, including the Controller's office, the Treasurer's office, the Finance Department, the State Lands Division and the Attorney General's office. Legal interpretations herein are stated on the authority of counsel for the Department and counsel retained by us.

We have conferred with certain financial firms and institutions and financial services, for the purpose of reviewing with them some of our conclusions as to financial aspects; and with officials of various important political subdivisions of the State, for the purpose of reviewing with them the prospective borrowing requirements of these subdivisions.

We have also drawn for our information upon the Department's Office Report of April 1960 ("Information and Data on Proposed Program for Financing and Con-

structing State Water Facilities"), upon the Department's revised Bulletin No. 78 of December 1959 ("Investigation of Alternative Aqueduct Systems to Serve Southern California"), upon appendices and supplements to such Office Report and Bulletin, upon financial reports of the State and its more important political subdivisions, and upon other reports and documents furnished to us by the Department or obtained by us from other sources.

The conclusions in this report are confined to those matters which we deem relevant to the financial aspects of the State's water program. As financial consultants, we are not concerned with political and social questions, except as they affect these financial aspects.

CONCLUSIONS AS TO FINANCIAL FEASIBILITY

Scope of Program

The Program upon which we are reporting (hereinafter called the "Program") consists of certain water conservation facilities to be located in the northern part of California and aqueduct facilities to transport the water for municipal, industrial and agricultural uses in Southern California, the San Joaquin Valley and certain other areas. These facilities are essentially (i) the "State Water Facilities" (other than the Davis-Grunsky Projects, which are discussed in this report), constituting part of the "State Water Resources Development System," as defined in the Burns-Porter Act (Chapter 1762, Statutes of 1959, herein called the "Act"), and (ii) the Eel River development, also constituting part of the State Water Resources Development System. The Act is being submitted to the people of the State to be voted upon at the general election of November 8, 1960.

The Program considered in this report differs from that considered in our interim report by including more water

conservation facilities, namely the Oroville development on the Feather River (constituting part of the State Water Facilities) and the Eel River development as mentioned above. This change has been made because of two occurrences since the date of our interim report: (i) the issuance by the State's Attorney General of an opinion (discussed in this report) which holds that the Act does not preclude financing the completion of construction of the full Program through additional bond issues, to be authorized in the future when and to the extent required and to be supported by a portion of the revenues to be derived from the operation of the Program, and (ii) the completion by the Consulting Engineers of their water supply studies, which indicate a materially smaller supply available for delivery through the aqueduct facilities than was contemplated by them at the date of our interim report, and accordingly indicate an insufficient economic justification for the program therein considered, unless followed by additional conservation facilities as contemplated by the Department.

With the addition of the Oroville and Eel River developments, as contemplated by the full Program considered by this report, the estimated water supply available for delivery through the aqueduct facilities will exceed, at least until the year 2040, the estimated 1990 demand.

Financial feasibility tests

As financial consultants, we interpret the question, upon which we are engaged to report, of "financial soundness and financial feasibility" of the Program to mean:

> (1) Can the costs of construction of the Program be provided out of the available construction funds, including funds to be borrowed, substantially without recourse to the State's general tax funds?

(2) Can the interest and principal payments on the funds to be borrowed be provided out of revenues (after deducting operating expenses) to be derived from the operation of the Program, substantially without recourse to the State's general tax funds?

(3) Can the State obtain the funds to be borrowed at reasonable cost and without material impact upon its credit?

We recognize that the foregoing financial feasibility tests may be more restrictive, with regard to the use of the State's general tax funds, than those which might be deemed applicable in a broad consideration of public policy.

General conclusions

We conclude that the Program would meet our financial feasibility tests on the basis of present construction cost levels.

No one can safely predict the course of construction costs during the period of construction of the Program, which covers approximately the next 30 years, or ignore the long-term upward trend of construction costs, which has been a characteristic of the economy for most of the past 30 years. A material increase in construction costs over present levels would require a material amount of financing additional to that provided by the Act, which consists of the proceeds of sales of Water Bonds authorized thereby and California Water Fund moneys. Unless recourse were to be had to the general tax funds of the State, we must assume that this additional financing would have to rely upon sales of bonds, additional to the Water Bonds, to be authorized in the future when and to the extent required, and to be supported by a portion of the revenues to be derived from the operation of the Program (predicated upon the opinion of the Attorney General, which is discussed in this report).

The accomplishment of the required additional bond financing would depend upon the then current borrowing

capacity of the State. The realization of the additional revenues required to service the additional bonds, as well as to defray operating expenses, would depend upon the then current economic capacity of the contractors for the water to pay the water charges required to produce these additional revenues. Of course, as to portions of the Program which shall have been completed at any time, subsequent increases in construction cost levels would not apply. The rate formula for the pricing of water to be delivered by the Program, as developed by the Consulting Engineers and discussed in this report, would produce revenues substantially sufficient (provided that the payment capacity of the contractors for the water is adequate to produce these revenues) to service all of the bonds to be issued for the construction of the Program, regardless of the level of construction costs, as well as to defray all operating expenses of the Program, regardless of the level of these expenses.

As a general principle, increases in construction cost levels, to the extent accompanied by increases in general price levels, should also be accompanied by increases in the over-all payment capacity of contractors for the water and in the State's borrowing capacity. The economic studies of the Consulting Engineers have led them to conclude that while this general principle is applicable as concerns the payment of capacity of prospective contractors for the water in urban areas, it is of limited application as concerns the payment capacity of prospective contractors for the water in agricultural areas, to which a substantial portion of the water is to be delivered by the Program. The Consulting Engineers are of the opinion that farm income per acre will not necessarily rise as general prices rise or as production increases, and that the development of irrigation in agricultural areas would be retarded if water charges, due to increases in construction and oper-

ating cost levels, were to rise faster than agricultural payment capacities.

The Consulting Engineers are further of the opinion that increases in operating expenses of the Program should be less than increases in general price levels, since a major part of these operating expenses is accounted for by the cost of electric energy for pumping, which cost has exhibited and under current conditions may be expected to continue to exhibit, relative stability. For the purpose of our report, we have considered that operating cost levels would probably not increase unless there were an increase in construction cost levels.

In their conclusions, the Consulting Engineers have assumed the formation of "master" districts, which would contract for the water in agricultural areas (in particular, in the San Jaquin Valley) and distribute it in such areas through member agencies, acting as sub-contractors. These districts would have a broad property tax base, in part embracing urban communities, thereby recovering from local property taxes a substantial portion of the wholesale charges for the water.

It is axiomatic that an increase in cost levels, unless accompanied by increases, if and to the extent required, in the payment capacity of all prospective contractors for the water, so as to produce revenues sufficient to service all of the bonds to be issued for the construction of the Program as well as to defray all operating expenses of the Program, would necessitate having recourse to the State's general tax funds. Although it must be recognized that there are limits to the State's taxable resources as well as to its borrowing capacity, some increases in both may be expected to accompany increases in cost levels.

A further discussion of the Program in relation to our financial feasibility tests, on the basis of estimated construction expenditures at present cost levels, follows.

Adequacy of funds

As to test (1) above: Substantially the entire costs to the State of construction of the Program, based on the estimated construction expenditures at present cost levels, would be provided out of the available construction funds, including funds to be borrowed as contemplated by the Act. These construction funds would consist of future Water Bond proceeds and the California Water Fund, which is derived principally from payments to the State of oil and gas royalties under certain tideland leases. The California Water Fund moneys available for construction would also include amounts repaid to this Fund, during the construction period, out of revenues (after deducting operating expenses) not required for current Water Bond Service.

However, as indicated below, there would remain a balance of construction expenditures to be financed from other sources. The amount of this balance is not substantial in relation either to the size of the Program or to the revenues of the State's General Fund. These revenues are derived principally from State taxes and are currently budgeted at $1,617 millions annually. If such a balance of construction expenditures were to be provided out of the General Fund, it could not be regarded as imposing a material burden on the general taxpayer.

The budget of funds required and of funds to be provided for the estimated future expenditures by the State for the construction of the Program, on the basis of present cost levels, is as follows:

		(000,000)	
Funds required:			
State Water Facilities		$1,677	
Eel River development		195	
Total funds required			$1,872
Funds to be provided:			
Water Bond issues	$1,582		
Less: portion thereof reserved for Davis-Grunsky Projects (discussed in this report)	130		
Water Bond issues for Program		$1,452	
California Water Fund moneys:			
On hand	$ 97		
To accrue from tidelands royalties	204		
Revenues not required for current Water Bond service	65		
Total California Water Fund moneys		$ 366	
Total funds to be provided			$1,818
Balance of construction expenditures to be financed from other sources			$ 54

The total amount of Water Bond issues authorized by the Act is $1,750 millions. Deducting from this total the amount of $1,582 millions of Water Bond issues, as shown in the foregoing budget, leaves a remainder of $168 millions of authorized Water Bonds, which cannot be used to complete the construction of the State Water Facilities by reason of a limitation contained in the Act upon expenditures of Water Bond proceeds for that purpose. These $168 millions of Water Bonds could be used only to complete the construction of the Eel River development, if required for that purpose, or to construct water facilities additional to those included in the Program.

The budgeted construction expenditures do not include interest during construction. The Act does not provide for the financing of this interest out of Water Bond proceeds or out of California Water Fund moneys. Under the rate

formula for pricing the water to be delivered by the Program, the calculated revenues would substantially cover this construction interest. To the extent not so covered, this interest would have to be advanced from the General Fund.

Adequacy of revenues

As to test (2) above: The revenues to be derived from the operation of the Program, as developed by the application of the rate formula to estimated construction expenditures and after deducting estimated operating expenses, both at present cost levels, would substantially cover the estimated requirements for service payments on the Water Bonds. In each but four of the years within the period to the final maturity of the Water Bonds to be issued for the construction of the Program, there would be an excess of net operating revenues over the Water Bond service payments. Withdrawals from the General Fund for Water Bond service would occur from 1978 to 1981, inclusive, would reach a maximum annual amount of about $4 millions, and would aggregate about $11 millions. They would soon be repaid, with interest, out of revenues derived thereafter. The amounts of these temporary withdrawals from the General Fund are nominal in relation to the revenues of this Fund.

The Consulting Engineers are of the opinion that the payment capacities of prospective contractors for the water to be delivered by the Program are sufficient to produce the revenues developed by the application of the rate formula based on present cost levels. This is in reliance upon the assumed formation of "master" districts in agricultural areas, as discussed above.

Borrowing costs and impact

As to test (3) above: The projected issues of Water Bonds as shown above total $1,582 millions on the basis of present construction cost levels. In keeping with the

requirements of the construction schedule, they would be issued in installments, commencing in 1964, about one-half of the total being issued during the period through 1970 and the remainder being spread out over the following 18 years.

In our opinion, these issues of Water Bonds can be marketed at reasonable cost and without material impact upon the State's credit, if they are properly scheduled in relation to the State's other borrowing requirements and if the State refrains (at least during the coming ten-year period, in which the requirements for Water Bond financing will be at a high level) from increasing the rate of its borrowings for other purposes. By reasonable cost, we mean a reasonable relationship between the interest cost on the Water Bonds and the then current market for long term money as well as that for the State's other bond issues.

While it is not practicable to predict the cost of interest rates during the construction period, we regard the Department's assumption of an average rate of 4% for the Water Bonds as reasonable, in the light of current conditions and historical perspective.

Certain assumptions

The more important assumptions not covered above, on which the foregoing conclusions are based, are the following:

(1) That the State carries out the construction of the Program substantially in accordance with the construction schedule developed therefor by the Consulting Engineers.

(2) That the State legislature does not exercise its right to appropriate moneys in the California Water Fund to purposes other than the construction of the Program.

(3) That expected future Congressional appropriations are received for certain specified features of the Program, and that necessary State-Federal agreements are entered into with regard to certain matters affecting the operation of the Program, all as discussed in this report.

(4) That contracts for the sale of substantially all of the water are executed, and that these contracts conform substantially to the rate formula developed by the Consulting Engineers.

THE PROGRAM

General

The Program will bring surplus water from the northern part of California to water-deficient areas in Southern California and, en route, in the San Joaquin Valley. This water will flow into the Delta (at the confluence of the Sacramento and San Joaquin Rivers near San Francisco Bay) and be distributed thence at wholesale by the State, acting through the Department.

The Program includes both aqueduct facilities and water conservation facilities. The principal aqueduct facilities consist of the San Joaquin Valley-Southern California Aqueduct (the "Main Aqueduct"), extending about 450 miles from the Delta to the general vicinity of Los Angeles (with east and west branches), including facilities to pump the water to an elevation of 3,400 feet for passage over the Tehachapi Mountains north of Los Angeles. The aqueduct facilities also include three branch aqueducts (aggregating about 200 miles), namely the North (San Francisco) Bay Aqueduct, the South (San Francisco) Bay Aqueduct and the Coastal Aqueduct (serving principally the Santa Barbara and San Luis Obispo area). In connection with the Main Aqueduct, the Program provides for a San Joaquin Valley drain to control the salt balance in that general service area.

The conservation facilities comprise works in the Delta consisting of channel improvements, levees and control structures; the San Luis dam and reservoir (about 70 miles south of the Delta), to be constructed and operated jointly with the Federal Government, and related facilities; the Oroville dam and reservoir on the Feather River (about 100 miles north of the Delta) and certain small related dams and reservoirs; and a series of dams and reservoirs (about 80 miles north of the Delta) to utilize the flow from the Middle Fork of the Eel River. Certain hydro-electric generating facilities are also included, the more important of which are to be located at the site of the Oroville development and on the Main Aqueduct on the south side of the Tehachapi Mountains.

The Program is authorized by the Act, which is being submitted to the people of the State to be voted upon November 8, 1960 ("election date"). The Act authorizes the construction of certain additional facilities and incorporates certain other legislation applicable to the Program. The entire Program is more fully described in the final report of the Consulting Engineers.

Both the Program and the Central Valley Project of the Federal Government, which has been constructed and is being expanded by the United States Bureau of Reclamation, bring to the San Joaquin Valley water which flows from the northern part of the State into the Delta. Most of the territory to be served by the Program lies to the west and south of the territory served by the Federal Central Valley Project, which does not include Southern California. The successful operation of the Program will depend upon satisfactory State-Federal agreements being reached regarding certain operating matters affecting both parties, as to which matters the Department advises that there is reasonable ground to expect that the necessary agreements will be forthcoming.

Water supply and demand

The conservation features of the Program will provide a regulated flow, normally available for delivery from the Delta, estimated at about 3,500,000 acre-feet annually until the year 2040. The aqueduct facilities are sized for deliveries from the Delta, net of aqueduct losses, of at least 3,750,000 acre-feet annually.

The demand for the water to be delivered from the Delta is estimated to increase to about 3,350,000 acre-feet annually by 1990. The Consulting Engineers have not used estimates of demand beyond 1990, although recognizing that the demand will in fact probably continue to grow, and that in order to meet substantially more than the 1990 demand the construction of facilities additional to the Program will ultimately be required, in the form of enlarged aqueduct facilities and of additional conservation facilities.

The Act recites that it does not affect the prior rights, as established in the State's Water Code, of any county of origin of water, and of any watershed wherein water originates or any area immediately adjacent thereto, to divert such water to their own use if required. Water so diverted upstream from the Delta will effect a reduction in the regulated flow available for delivery from the Delta, for which the Consulting Engineers have made allowance in their estimates. This allowance is considered by them to be ample for the development of a conservative schedule of construction of conservation facilities, so as to meet the demand when it occurs.

The following table shows the estimated regulated flow available for delivery from the Delta (net of evaporation and seepage losses), to be provided by the conservation facilities included in the Program, as of 1990 and as of 2040, and the estimated 1990 demand for each of the general service areas to which water is to be delivered by the Program:

	Acre-feet Annually	
Regulated flow provided:	1990	2040
Delta and San Luis developments	2,060,000	1,550,000
Oroville development	990,000	940,000
Eel River development	1,000,000	1,000,000
Total available for delivery from Delta	4,050,000	3,490,000
Demand:	1990	
Southern California (below Tehachapi Mountains)	1,750,000	
San Joaquin Valley	1,170,000	
North (San Francisco) Bay	150,000	
South (San Francisco) Bay	170,000	
Coastal (Santa Barbara and San Luis Obispo area)	110,000	
Total demand	3,350,000	

The foregoing estimated water demands are taken as the deliveries from the aqueduct facilities for 1990 and subsequent years. Initially, the deliveries are expected to be quite small. The dates of initial deliveries are estimated as 1970 for parts of Southern California, 1968 for parts of the San Joaquin Valley, 1970 for the North Bay area, 1963 for the South Bay area, and 1974 for the Coastal area.

These deliveries exclude prospective water deliveries by the Program to certain Feather River areas, upstream from the Delta, which deliveries would not utilize the aqueduct facilities. This water would constitute part of that to which these areas are entitled under the prior rights of counties of origin, as refered to above, and has been deducted in the calculation of regulated flow provided by the conservation facilities. The 1990 deliveries to these areas are estimated at about 320,000 acre-feet.

Certain considerations affecting demand

The water to be delivered by the Program is destined both for municipal (that is, primarily domestic) and industrial use and for agricultural (that is, primarily irrigation) use. About 90% of the water for Southern California and

the South Bay areas is for municipal and industrial use. About 90% of the water for the San Joaquin Valley area is for agricultural use, and includes substantial volumes expected to be used for the irrigation of areas not now farmed or irrigated. The water for the North Bay and the Coastal areas is for both classes of use. That for the Feather River areas upstream from the Delta is almost entirely for agricultural use.

The Southern California area in particular is experiencing rapid growth and development, the continuance of which will depend in part, in the opinion of the Consulting Engineers, on the receipt of water from the Program. The report handed down in May 1960 by the Special Master appointed by the United States Supreme Court, in the Colorado River case, tends to support the expectation of substantial demand from this area. If the Special Master's recommendations are adopted by that Court, the Metropolitan Water District of Southern California, which is the largest prospective contractor for water to be delivered by the Program, could ultimately lose the use of about 1,200,000 acre-feet anually of Colorado River water. This could accelerate the timing of deliveries of water by the Program as estimated for the Southern California area.

In general, agricultural users cannot afford to pay as high rates for water as can municipal and industrial users. While the price of water is usually a minor factor in the budget of households and industrial establishments, it is usually a major factor for agricultural users, as it may mean the difference between success and failure in farm operation and may also be the determining factor in the development of new agricultural areas. As to agricultural areas, the estimates of water deliveries rely especially upon present cost levels and the adoption of the rate formula developed by the Consulting Engineers, as explained later in this report, as well as upon the formation of "master" districts, as discussed earlier in this report.

Appendix H

In the United States District Court
for the Northern District of California

No. C-80-3964-WAI

County of Del Norte, et al.,
Plaintiffs,
vs.
Cecil D. Andrus, Secretary of the Interior, et al.,
Defendants.

State of California,
Intervenor.

[Filed Jan. 16, 1981]

MEMORANDUM OF DECISION

The application for summary judgment on the question of the timely giving of notice of the filing of the Final Environmental Impact Statement with the Environmental Protection Agency is granted.

There is no genuine issue of material fact with respect to the issue raised by the motion. The evidence is uncontradicted that the Final Environmental Impact Statement was filed with the Environmental Protection Agency on December 12, 1980. (*See* Exhibit B to plaintiff's Memorandum of Points and Authorities in Support of Summary Declaratory Relief.) Included in the said Exhibit B is a verification that complete distribution of the Statement to all agencies and persons was made simultaneously with the filing. In fact, no distribution had been made at that time. (Deposition of O'Neil, p. 6 ln. 17-22). Plaintiffs received no copy of the Statement until December 17, 1980. (Declaration of Klein, Exhibit E to plaintiff's said Memorandum.) Delivery may have been accomplished in some instances on December 15, 1980, but the Washington, D.C.

Office of the Heritage Conservation and Recreation Service, an agency of the Department of the Interior, which prepared the Statement, had no copies available for distribution on that date. (Declaration of Lukin, Exhibit F to plaintiff's said Memorandum.) Publication in the Federal Register occurred on December 17, 1980, the same day that plaintiffs received their copies of the Statement. (Exhibit B to Final Defendants' Memorandum in Opposition to Application for Summary Judgment.)

The Council on Environmental Quality has promulgated the regulations regarding the giving of notice of the filing of Environmental Impact Statements with the Environmental Protection Agency. Section 1506.10 (40 CFR § 1506.10). That section provides in substance, and in pertinent part, that publication in the Federal Register shall ensue in the week following the filing of Environmental Impact Statements, and that no decision upon such Statements by any federal agency shall be rendered until the latest to occur of two events. These are: (1) 90 days after publication of notice of filing of a draft Environmental Impact Statement; or (2) 30 days after publication of notice of filing of Final Environmental Impact Statement.

Section 1506.9 (40 CFR § 1506.9) provides in substance that Statements shall not be filed with the Environmental Protection Agency earlier than they are also transmitted to commenting agencies, and made available to the public.

Thus, the notice envisaged by these sections is that Final Environmental Impact Statements shall be filed with the Environmental Protection Agency concurrently with their public availability, that notice of their filing shall be published in the Federal Register in the week following their concurrent filing and distribution, and that no federal action upon the proposal concerning which the Statement is prepared and filed shall occur for at least 30 days thereafter.

Consonant with section 1506.10, all minimum time periods, including decisions on proposals concerning which Final Environmental Impact Statements have been filed shall be calculated from the time of publication in the Federal Register.

In the instant case, the filing with the Environmental Protection Agency, although verified to be concurrent with public availability, actually preceded public availability of the Statement by several days. Publication in the Federal Register, and distribution to plaintiffs, occurred on the same day, December 17, 1980. At oral argument, it was conceded that the event which sets in motion the publication is the filing of the Statement together with the verification of concurrent public distribution.

If the provisions of section 1506.9 and 1506.10, had been properly complied with, the earliest valid filing would have been during the week of December 15, 1980, and the earliest publication in compliance with the provisions of section 1506.10, would have been during the week of December 22, 1980.

This Court is of opinion that the minimum time for agency action should be extended until 30 days following December 22, 1980.

In their memorandum, and at oral argument, defendants contended that the obvious purpose of section 1506.9 is that final copies of Environmental Impact Statements be actually available to the public on the date that the 30 day period provided in section 1506.10 begins to run, that is, the date of publication in the Federal Register. They rely on the so-called PEP memorandum (Exhibit C to defendants' Memorandum of Points and Authorities). This memorandum, signed by Bruce Blanchard, Director of the Office of Environmental Project Review of the Department of the Interior, states that the time period for public availability of the Statement prior to administrative action is

the latest of the following three dates: (1) filing of copies of the Statement with the Council on Environmental Quality; (2) distribution to federal and state agencies and clearing houses; and (3) publication of notice of public availability in the Federal Register. The memorandum is directed to heads of bureaus and offices, and is clearly an in-house memorandum. Defendants also rely upon declarations executed by Foster Knight, Acting General Counsel for the Council of Environmental Quality, and by Gus Speth, Chairman of the Council on Environmental Quality. Mr. Knight states his opinion that sections 1506.9 and 1506.10 are satisfied if the Final Environmental Impact Statement is available for public review for 30 days following publication in the Federal Register, and that public availability prior to publication constitutes a trivial violation pursuant to section 1500.3. (This Court is sure that Mr. Knight meant to say a lack of public availability prior to publication.) Mr. Speth states that sections 1506.9 and 1506.10 are satisfied if public review is available for 30 days following publication, and that the requirement of publication of notices filed "the preceding week," is not intended to enlarge the time for public and agency review. He further states that providing that the 30 day period for review and comment is available following publication, a failure to complete delivery to agencies and the public during the period preceding publication is at most, a "trivial violation," within the meaning of 40 CFR § 1500.3. Defendants rely on these declarations, the second of which was filed after this matter was argued and submitted, is unsigned and thus is probably not competent evidence to establish the contention that any failure of compliance constitutes a mere "trivial violation," as that term is used in 40 CFR § 1500.3. Defendants rely on these declarations, the second of which was filed after this matter was argued and submitted, is unsigned and thus is probably not competent evidence to establish the contention that any failure of

compliance constitutes a mere "trivial violation," as that term is used in 40 CFR § 1500.3. That section provides in part that no independent cause of action shall arise as the result of any trivial violation of the regulations, including sections 1506.9 and 1506.10.

The PEP memorandum and the two declarations express the views of an agency of the Department of the Interior, and of two officials of the Council of Environmental Quality with respect to the time available for public review of Final Environmental Impact Statements, which they all state to be 30 days. The declarations characterize the violation of sections 1506.9 and 1506.10, to be trivial violations.

These regulations should be construed in accordance with their plain meaning as they would be understood by the ordinary man who has a right to rely on ordinary words addressed to him. *Cf. Lubrizol Corp. v. Environmental Protection Agency,* 562 F.2d 807 (D.C. Cir. 1977). The construction placed upon the sections in issue as reflected in the exhibits relied upon by defendants is at odds with the plain meaning of the words employed in section 1506.9 and 1506.10. It also conflicts with the apparent interpretation by the Environmental Protection Agency which, as already indicated, requires verification of complete simultaneous distribution to all agencies and persons as a condition to filing of Final Environmental Impact Statements. (Exhibit B to plaintiff's Memorandum.)

The Court finds that the filing of the Final Statement did not accord with the requirements of section 1506.09, and the publication of notice of filing did not accord with the requirements of section 1506.10.

No explanation by declaration or otherwise has been proffered by defendants as to why the Department of Interior employee who filed the Final Statement represented as true facts which were not true. Perhaps he acted

in reliance upon a construction of the regulations advocated by his agency as reflected in the PEP memorandum, and a belief based thereon that distribution would occur simultaneously with Federal Register publication, and that this would be sufficient to allow the minimum period of 30 days for the public to consider the Final Statement and to comment thereon. Whatever his motivation, there was a failure of regulatory compliance.

Plaintiffs were entitled to the benefit of the time limits contemplated by the plain wording of the regulations. The scope of the Environmental Impact Statement in this case is broad and it is complex. The record reveals that the preparation both of the draft Statement and of the Final Statement were rushed. This Court in considering prior applications for relief in this same case has observed that in the opinion of agents of defendants themselves, at least twice as much time as was actually consumed was originally deemed necessary for the proper and reasoned preparation of the draft Statement. The defects in filing raised in the current application are consistent with the hurried, rather headlong course of conduct which pervades this entire matter. It is apparent that the regulations contemplate a period of more than 30 days for public consideration of the Statement. A deprivation of any of the time so contemplated constitutes more than a trivial violation of the regulatory scheme in the context of the facts of this case.

Defendants contend that any consideration by this Court of defects of the sort here alleged is premature. They say that the Court should not intrude upon the administrative process until a secretarial decision is rendered. They invoke the ripeness doctrine articulated in *Abott Laboratories v. Gardner,* 387 U.S. 136 (1967). The basic rationale of that doctrine is that courts should not prematurely become entangled in abstract disagreements over administrative policies, and that agencies should be protected from

interference until contesting parties feel the force of the effect of agency determinations. *See Pence v. Andrus,* 586 F.2d 733, 737 (9th Cir. 1978). There is no question here of abstract disagreement with agency policies or of interference with administrative decisional policies. The only question is whether defendants complied with regulatory filing requirements, and whether the resultant 30 day limitation on decision power was properly instituted in accordance with section 1506.10. Agency action must observe the procedures required by law and are reviewable in the event of a failure to follow procedural standards. *Lathan v. Brinegar,* 506 F.2d 677 (9th Cir. 1974). Furthermore, the promulgators of the regulations here in issue contemplate the propriety of judicial review at this particular stage in the administrative process. 40 CFR § 1500.3 provides in pertinent part as follows:

> [I]t is the Council's intention that judicial review of agency compliance with these regulations not occur before an agency has filed the final environmental impact statement, or has made a final finding of no significant impact (when such a finding will result in action affecting the environment), or takes action that will result in irreparable injury.

The defendant Department of the Interior did not comply, and the 30 day limitation period was not properly instituted. The decisional powers of the Secretary are not subject to any intrusion by this conclusion. The defendant Secretary, or his successor, are free to act without judicial restraint upon the expiration of the minimum time period mandated in section 1506.10.

The 30 day period provided in section 1506.10(b)(2), should have commenced no earlier than December 22, 1980. Plaintiffs are entitled to this Court's declaratory order so stating.

There is no genuine issue of material fact on this issue, and plaintiffs are entitled to the relief they seek as a matter of law.

Dated: 1/16/81

/s/WILLIAM A. INGRAM
United States District Judge

Appendix I

United States Court of Appeals
for the Ninth Circuit

No. 81-3036
DC No. CV 81-34
Oregon (Portland)

County of Josephine; County of Klamath;
County of Curry; County of Douglas;
Grants Pass & Josephine County Chamber of Commerce;
Southern Oregon Resources Alliance;
North West Timber Association;
and Rough & Ready Lumber Company,
Plaintiffs-Appellees,

vs.

Cecil D. Andrus, Secretary of the Interior;
The Department of the Interior;
Chris Therral Delaporte, Director
of the Heritage Conservation and Recreation Service;
John D. Cherry, Regional Director
of the Heritage Conservation and Recreation Service;
Robert Bergland, Secretary of Agriculture;
The Department of Agriculture;
R. Max Peterson, Chief of the United States
Forest Service; and the United States Forest Service,
Defendants-Appellants.

No. 81-4030
DC No. C-80-3964
California (Northern)

County of Del Norte, County of Trinity,
County of Siskiyou, County of Humboldt,
Del Norte Unified School District,

The Eureka Chamber of Commerce,
The Pacific Lumber Co., et al.,
Plaintiffs-Appellees

vs.

Cecil D. Andrus, Secretary of the Interior;
The Department of the Interior;
Chris Therral Delaporte, Director
of the Heritage Conservation and Recreation Service, et al.,
Defendants-Appellants,

and

State of California,
Intervenor-Appellant.

Before: ANDERSON, ALARCON, and POOLE, Circuit Judges

ORDER

In both cases, we conclude that no final agency action has yet occurred.

The issues as framed are not ripe for judicial resolution. See *Gardner v. Toilet Goods Association, Inc.*, 387 U.S. 167 (1967); *Bennett Hills Grazing Association v. United States*, 600 F.2d 1308, 1309 (9th Cir. 1979). Both district courts therefore were without jurisdiction.

The temporary restraining order entered in the United States District Court for the District of Oregon is vacated. The judgment and injunctive order of the United States District Court for the Northern District of California are vacated. Each case is remanded to the respective district court with directions to dismiss this action. This dismissal is without prejudice to appellee's rights to refile their actions if and when final agency action occurs.

The motions for stays are denied as moot.

Mandate to issue forthwith.

Appendix J

Notices

Department of the Interior

Office of the Secretary

Approval for Inclusion in the National Wild and Scenic Rivers System as State Administered Components

Friday, January 23, 1981

Citation: 46 FR 7484-01

Agency: Interior.

Action: Notice.

Pursuant to the authority granted the Secretary of the Interior by Section 2 of the Wild and Scenic Rivers Act (82 Stat. 906 16 U.S.C. 1273), and upon proper application of the Governor of the State of California, five California rivers are hereby designated as State administered components of the National Wild and Scenic Rivers System. This action is based on the designation of the rivers by the State of California and the protections offered these rivers and their immediate environments by and pursuant to applicable State laws and regulations.

On July 18, 1980, the Governor of California petitioned the Secretary of the Interior to add all or portions of the Eel, Smith, Trinity, Klamath and American Rivers to the National System. (See Federal Register of August 7, 1980, page 52459.) These rivers had been designated in the State Wild and Scenic Rivers System in 1972. The following river segments are now components of both the California and National Wild and Scenic Rivers Systems and will continue under State administration except for adjacent Federal lands:

(a) Klamath River. The main stem from 3600 feet below Iron Gate Dam to the Pacific Ocean: the Scott River

from the mouth of Shackleford Creek west of Fort Jones to the river mouth near Hamburg: the Salmon river from Cecilville Bridge to the river mouth near Somesbar; the North Fork of the Salmon River from the intersection of the river with the south boundary of the Marble Mountain Wilderness Area to the river mouth; Wooley Creek, from the western boundary of the Marble Mountain Wilderness Area to its confluence with the Salmon river.

(b) Trinity River. The main stem from 100 yards below Lewiston Dam to the river mouth at Weitchpec; the North Fork of the Trinity from the intersection of the river with the southern boundary of the Salmon-Trinity Primitive Area downstream to the river mouth at Helena; New River from the intersection of the river with the Southern Boundary of the Salmon-Trinity Primitive Area downstream to the river mouth near Burnt Ranch; South Fork of the Trinity from the junction of the river with State Highway 36 to the river mouth near Salyer.

(c) Eel River. The main stem from 100 yards below Van Arsdale Dam to the Pacific Ocean; the South Fork of the Eel from the mouth of Section Four Creek near Branscomb to the river mouth below Weott; Middle Fork of the Eel from the intersection of the river with the southern boundary of the Middle Eel-Yolla Bolly Wilderness Area to the river mouth at Dos Rios; North Fork of the Eel from Old Gilman Ranch downstream to the river mouth near Ramsey; Van Duzen river from Dinsmores Bridge downstream to the river mouth near Fortuna.

(d) American River. The Lower American from Nimbus Dam to its junction with the Sacramento River.

(e) Smith River. The main stem from the confluence of the Middle and South Forks to its mouth at the Pacific Ocean, the Middle Fork Smith River from its source about 3 miles south of Sanger Lake as depicted on 1956 USGS 15 "Preston Peak" topographic map to the confluence with

the South Fork; the South Fork Smith River from its source about 0.5 miles southwest of Bear Mountain as depicted on 1956 USGS 15 "Preston Peak" topographic map to the confluence with the Middle Fork Smith River; the North Fork Smith River from the California-Oregon boundary to the confluence with the Middle Fork Smith River; the Siskiyou Fork of the Smith River from its source about 0.7 miles southeast of Broken Rib Mountain as depicted on 1956 USGS 15 "Preston Peak" topographic map to the confluence with the Middle Fork of the Smith River, and the South Siskiyou Fork of the Smith River from its source about 0.6 miles southwest of Buck Lake as depicted on 1956 USGS 15 "Preston Peak" topographic map to the confluence with Siskiyou Fork of the Smith River.

Also included are the following smaller tributaries in the Smith River System: Rowdy Creek, Dominie Creek, Savoy Creek, Little Mill Creek, Mill Creek, Lower West Branch of Mill Creek, East Fork of Mill Creek, Bummer Lake Creek, Still Creek, Diamond Creek, High Plateau Creek, Bear Creek, North Fork Diamond Creek, Myrtle Creek, Kelly Creek, Patrick Creek, Shelly Creek, East Fork Patrick Creek, West Fork Patrick Creek, Monkey Creek, Packsaddle Creek, Griffin Creek, Knopki Creek, Craigs Creek, Coon Creek, Rock Creek, Gordon Creek, Canthook Creek, Goose Creek, East Fork of Goose Creek, Hurdygurdy Creek, Jones Creek, Muzzleloader Creek, Buck Creek, Quartz Creek, Eight Mile Creek, Williams Creek, Prescott Fork Smith River.

The beginning and ending points for designation of these smaller tributaries shall be as defined in INT FEIS 80-53.

The river resources involved in the State's application are protected to a great extent by their inclusion in the State System. Inclusion in the National System as well will have two major effects: (1) It will prevent Federal participation and assistance in the development of water resource

projects which would have a direct and adverse effect on the values for which the rivers have been designated (anadromous fishery resources in all cases, as well as white-water boating in the cases of the North Fork Smith and Middle Fork Eel and recreation in the case of the American River), and (2) it will require Federal land-managing agencies (primarily the U.S. Forest Service and the Bureau of Land Management) to reassess management policies, plans, regulations and contracts on lands adjacent to river segments, and to conform them with the intent of Wild and Scenic River designation. Designation will also prohibit new mining claims on Federal lands within a quarter mile of segments classified as "wild" and will impose environmentally protective conditions on other mining operations within river corridors.

For purposes of inclusion in the National Wild and Scenic Rivers System and as management direction to Federal agencies administering Federal lands adjacent to the above-described segments, the designated rivers will be managed in accordance with the classifications "wild," "scenic" and "recreational" as determined appropriate by the Heritage Conservation and Recreation Service and as stated in Appendix D of the Final Environmental Impact Statement, INT FEIS 80.53. "Proposed Designation of Five California Rivers in the National Wild and Scenic Rivers Systems" with the exception of the Smith River System. In the case of the smaller Smith River tributaries, beginning with Rowdy Creek and ending with Prescott Fork Smith River, these are classified as "recreational."

This action is taken following substantial public involvement and consultation with the Department of Agriculture, Federal Energy Regulatory Commission, U.S. Army Corps of Engineers and other Federal agencies as required by Section 4(c) of the Wild and Scenic Rivers Act. Public scoping meetings to identify important issues which needed to be covered in the environmental impact statement were

held in four California locations in August. Public meetings were held in five California locations in October to receive comments on the adequacy of the draft environmental statement and the merits of the Governor's proposal. All comments received throughout the application process have been carefully considered.

Notice is hereby given that effective upon this date, the above-described rivers and river segments are approved for inclusion in the National Wild and Scenic Rivers System as wild, scenic and recreational river areas to be administered by the State of California except for affected Federal lands.

The primary author of this notice is John Haubert, Heritage Conservation and Recreation Service, Department of the Interior, Washington, D.C. 20243, phone 202/343-4793.

Dated: January 19, 1981, 7:45 p.m. E.S.T.

Cecil D. Andrus,
Secretary of the Interior.

Appendix K

U.S. CONSTITUTION

AMENDMENT X—RESERVED POWERS TO STATES

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

THE ADMINISTRATIVE PROCEDURES ACT

5 U.S. Code, § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.

THE WILD AND SCENIC RIVERS ACT

16 U.S. Code, § 1271. Congressional declaration of policy

It is hereby declared to be the policy of the United States that certain selected rivers of the Nation which, with their immediate environments, possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values, shall be preserved in free-flowing condition, and that they and their immediate environments shall be protected for the benefit and enjoyment of present and future generations. The Congress declares that the established national policy of dam and other construction at appropriate sections of the rivers of the United States needs to be complemented by a policy that would preserve other selected rivers or sections thereof in their free-flowing condition to protect the water quality of such rivers and to fulfill other vital national conservation purposes.

Pub.L. 90-542, § 1(b), Oct. 2, 1968, 82 Stat. 906.

§ 1273. National wild and scenic rivers systems; Congressional authorization for inclusion; designation by State legislatures; permanent administration by States; application for inclusion by Governors; satisfaction of criteria; eligibility for inclusion; notification of Federal Energy Regulatory Commission; publication in Federal Register; expense to the United States; federally owned lands within boundaries of State rivers

(a) The national wild and scenic rivers system shall comprise rivers (i) that are authorized for inclusion

therein by Act of Congress, or (ii) that are designated as wild, scenic or recreational rivers by or pursuant to an act of the legislature of the State or States through which they flow, that are to be permanently administered as wild, scenic or recreational rivers by an agency or political subdivision of the State or States concerned that are found by the Secretary of the Interior, upon application of the Governor of the State or the Governors of the States concerned, or a person or persons thereunto duly appointed by him or them, to meet the criteria established in this chapter and such criteria supplementary as he may prescribe, and that are approved by him for inclusion in the system, including, upon application of the Governor of the State concerned, the Allagash Wilderness Waterway, Maine; that segment of the Wolf River, Wisconsin, which flows through Langlade County; and that segment of the New River in North Carolina extending from its confluence with Dog Creek downstream approximately 26.5 miles to the Virginia State line. Upon receipt of an application under clause (ii) of this subsection, the Secretary shall notify the Federal Energy Regulatory Commission and publish such application in the Federal Register. Each river designated under clause (ii) shall be administered by the State or political subdivision thereof without expense to the United States other than for administration and management of federally owned lands. For purposes of the preceding sentence, amounts made available to any State or political subdivision under the Land and Water Conservation Act of 1965 [16 U.S.C.A. § 460*l*-4 et seq.] or any other provision of law shall not be treated as an expense to the United States. Nothing in this subsection shall be construed to provide for the transfer to, or administration by, a State or local authority of any federally owned lands which are within the boundaries of any river included within the system under clause (ii).

(b) A wild, scenic or recreational river area eligible to be included in the system is a free-flowing stream and the related adjacent land area that possesses one or more of the values referred to in section 1271 of this title. Every wild, scenic or recreational river in its free-flowing condition, or upon restoration to this condition, shall be considered eligible for inclusion in the national wild and scenic rivers system and, if included, shall be classified, designated, and administered as one of the following:

(1) Wild river areas—Those rivers or sections of rivers that are free of impoundments and generally inaccessible except by trail, with watersheds or shorelines essentially primitive and waters unpolluted. These represent vestiges of primitive America.

(2) Scenic river areas—Those rivers or sections of rivers that are free of impoundments, with shorelines or watersheds still largely primitive and shorelines largely undeveloped, but accessible in places by roads.

(3) Recreational river areas—Those rivers or sections of rivers that are readily accessible by road or railroad, that may have some development along their shorelines, and that may have undergone some impoundment or diversion in the past.

Pub.L. 90-542, § 2, Oct. 2, 1968, 82 Stat. 906.

16 U.S. CODE

§ 1278. Restrictions on water resources projects

(a) Construction projects listed by Federal Energy Regulatory Commission

The Federal Energy Regulatory Commission shall not license the construction of any dam, water conduit, reservoir, powerhouse, transmission line, or other project works under the Federal Power Act (41 Stat. 1063), as amended (16 U.S.C. 791a et seq.), on or directly affecting any river

which is designated in section 1274 of this title as a component of the national wild and scenic rivers system or which is hereafter designated for inclusion in that system, and no department or agency of the United States shall assist by loan, grant, license, or otherwise in the construction of any water resources project that would have a direct and adverse effect on the values for which such river was established, as determined by the Secretary charged with its administration. Nothing contained in the foregoing sentence, however, shall preclude licensing of, or assistance to, developments below or above a wild, scenic or recreational river area or on any stream tributary thereto which will not invade the area or unreasonably diminish the scenic, recreational, and fish and wildlife values present in the area on October 2, 1968. No department or agency of the United States shall recommend authorization of any water resources project that would have a direct and adverse effect on the values for which such river was established, as determined by the Secretary with its administration, or request appropriations to begin construction of any such project, whether heretofore or hereafter authorized, without advising the Secretary of the Interior or the Secretary of Agriculture, as the case may be, in writing of its intention so to do at least sixty days in advance, and without specifically reporting to the Congress in writing at the time it makes its recommendation or request in what respect construction of such project would be in conflict with the purposes of this chapter and would affect the component and the values to be protected by it under this chapter. Any license heretofore or hereafter issued by the Federal Energy Regulatory Commission affecting the New River of North Carolina shall continue to be effective only for that portion of the river which is not included in the National Wild and Scenic Rivers System pursuant to section 1273 of this title and no project or undertaking so

licensed shall be permitted to invade, inundate or otherwise adversely affect such river segment.

(b) Construction projects on rivers designated for potential addition to system

The Federal Energy Regulatory Commission shall not license the construction of any dam, water conduit, reservoir, powerhouse, transmission line, or other project works under the Federal Power Act, as amended [16 U.S.C.A. § 791a et seq.], on or directly affecting any river which is listed in section 1276(a) of this title, and no department or agency of the United States shall assist, by loan, grant, license, or otherwise in the construction of any water resources project that would have a direct and adverse effect on the values for which such river might be designated, as determined by the Secretary responsible for its study or approval—

(i) during the ten-year period following October 2, 1968 or for a three complete fiscal year period following any Act of Congress designating any river for potential addition to the national wild and scenic rivers system, whichever is later, unless, prior to the expiration of the relevant period, the Secretary of the Interior and, where national forest lands are involved, the Secretary of Agriculture, on the basis of study, determine that such river should not be included in the national wild and scenic rivers system and notify the Committees on Interior and Insular Affairs of the United States Congress, in writing, including a copy of the study upon which the determination was made, at least one hundred and eighty days while Congress is in session prior to publishing notice to that effect in the Federal Register: *Provided,* That if any Act designating any river or rivers for potential addition to the national wild and scenic rivers system provides a period for the study or studies which exceeds such three complete fiscal year period the period provided for in such Act shall be

substituted for the three complete fiscal year period in the provisions of this clause (i); and

(ii) during such additional period thereafter as, in the case of any river the report for which is submitted to the President and the Congress, is necessary for congressional consideration thereof or, in the case of any river recommended to the Secretary of the Interior for inclusion in the national wild and scenic rivers system under section 1273(a)(ii) of this title, is necessary for the Secretary's consideration thereof, which additional period, however, shall not exceed three years in the first case and one year in the second.

Nothing contained in the foregoing sentence, however, shall preclude licensing of, or assistance to, developments below or above a potential wild, scenic or recreational river area or on any stream tributary thereto which will not invade the area or diminish the scenic, recreational, and fish and wildlife values present in the potential wild, scenic or recreational river area on the date of approval of this chapter. No department or agency of the United States shall, during the periods hereinbefore specified, recommend authorization of any water resources project on any such river or request appropriations to begin construction of any such project, whether heretofore or hereafter authorized, without advising the Secretary of the Interior and, where national forest lands are involved, the Secretary of Agriculture in writing of its intention so to do at least sixty days in advance of doing so and without specifically reporting to the Congress in writing at the time it makes its recommendation or request in what respect construction of such project would be in conflict with the purposes of this chapter and would affect the component and the values to be protected by it under the chapter.

(c) Activities in progress affecting river of system; notice to Secretary

The Federal Energy Regulatory Commission and all other Federal agencies shall, promptly upon enactment of this chapter, inform the Secretary of the Interior and, where national forest lands are involved, the Secretary of Agriculture, of any proceedings, studies, or other activities within their jurisdiction which are now in progress and which affect or may affect any of the rivers specified in section 1276(a) of this title. They shall likewise inform him of any such proceedings, studies, or other activities which are hereafter commenced or resumed before they are commenced or resumed.

Grants Under Land and Water Conservation Fund Act of 1965

(d) Nothing in this section with respect to the making of a loan or grant shall apply to grants made under the Land and Water Conservation Fund Act of 1965.

§ 1281. Administration—Public use and enjoyment of components; protection of features; management plans

(a) Each component of the national wild and scenic rivers system shall be administered in such manner as to protect and enhance the values which caused it to be included in said system without, insofar as is consistent therewith, limiting other uses that do not substantially interfere with public use and enjoyment of these values. In such administration primary emphasis shall be given to protecting its esthetic, scenic, historic, archeologic, and scientific features. Management plans for any such component may establish varying degrees of intensity for its protection and development, based on the special attributes of the area.

Wilderness areas

(b) Any portion of a component of the national wild and scenic rivers system that is within the national wilderness preservation system, as established by or pursuant to the Wilderness Act, shall be subject to the provisions of both the Wilderness Act and this chapter with respect to preservation of such river and its immediate environment, and in case of conflict between the provisions of the Wilderness Act and this chapter the more restrictive provisions shall apply.

Areas administered by National Park Service and Fish and Wildlife Service

(c) Any component of the national wild and scenic rivers system that is administered by the Secretary of the Interior through the National Park Service shall become a part of the national park system, and any such component that is administered by the Secretary through the Fish and Wildlife Service shall become a part of the national wildlife refuge system. The lands involved shall be subject to the provisions of this chapter and the Acts under which the national park system or national wildlife system, as the case may be, is administered, and in case of conflict between the provisions of this chapter and such Acts, the more restrictive provisions shall apply. The Secretary of the Interior, in his administration of any component of the national wild and scenic rivers system, may utilize such general statutory authorities relating to areas of the national park system and such general statutory authorities otherwise available to him for recreation and preservation purposes and for the conservation and management of natural resources as he deems appropriate to carry out the purposes of this chapter.

Statutory authorities relating to national forests

(d) The Secretary of Agriculture, in his administration of any component of the national wild and scenic rivers system area, may utilize the general statutory authorities relating to the national forests in such manner as he deems appropriate to carry out the purposes of this chapter.

Cooperative agreements with State and local governments

(e) The Federal agency charged with the administration of any component of the national wild and scenic rivers system may enter into written cooperative agreements with the Governor of a State, the head of any State agency, or the appropriate official of a political subdivision of a State for State or local governmental participation in the administration of the component. The States and their political subdivisions shall be encouraged to cooperate in the planning and administration of components of the system which include or adjoin State- or county-owned lands.

Pub.L. 90-542, § 10, Oct. 2, 1968, 82 Stat. 916.

16 U.S. CODE

§ 1286. Definitions

As used in this chapter, the term—

(a) "River" means a flowing body of water or estuary or a section, portion, or tributary thereof, including rivers, streams, creeks, runs, kills, rills, and small lakes.

(b) "Free-flowing", as applied to any river or section of a river, means existing or flowing in natural condition without impoundment, diversion, straightening, riprapping, or other modification of the waterway. The existence, however, of low dams, diversion works, and other minor structures at the time any river is proposed for inclusion in the national wild and scenic rivers system

shall not automatically bar its consideration for such inclusion: *Provided,* That this shall not be construed to authorize, intend, or encourage future construction of such structures within components of the national wild and scenic rivers system.

(c) "Scenic easement" means the right to control the use of land (including the air space above such land) within the authorized boundaries of a component of the wild and scenic rivers system, for the purpose of protecting the natural qualities of a designated wild, scenic or recreational river area, but such control shall not affect, without the owner's consent, any regular use exercised prior to the acquisition of the easement.

THE NATIONAL ENVIRONMENTAL POLICY ACT

42 U.S. Code, § 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate

consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to

States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.

(E) study, develop, and describe appropriate alternatives to recommend courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend

appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by subchapter II of this chapter.

Pub.L. 91-190, Title I, § 102, Jan. 1, 1970, 83 Stat. 853; Pub.L. 94-83, Aug. 9, 1975, 89 Stat. 424.

CALIFORNIA CONSTITUTION

Article III, § 3. Enumeration; exercise

Sec. 3. The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution.

CALIFORNIA CONSTITUTION

Article IV, § 1. Legislative power

Sec. 1. The legislative power of this State is vested in the California Legislature which consists of the Senate and Assembly, but the people reserve to themselves the powers of initiative and referendum.

ARTICLE V, § 1: The supreme executive power of this State is vested in the Governor. The Governor shall see that the law is faithfully executed.

CALIFORNIA WATER CODE

§ 10004. California water plan; amendments, supplements and additions

The plan for the orderly and co-ordinated control, protection, conservation, development, and utilization of the water resources of the State which is set forth and described in Bulletin No. 1 of the State Water Resources Board entitled "Water Resources of California," Bulletin No. 2 of the State Water Resources Board entitled, "Water Utilization and Requirements of California," and Bulletin No. 3 of the Department of Water Resources entitled, "The California Water Plan," with such amendments, supplements and additions as may be later necessary, shall be known as "The California Water Plan." The Department of Water Resources shall, from time to time, adopt such amendments, supplements and additions to the plan as it finds necessary and desirable, which amendments, supplements and additions shall become effective when reported to the Legislature at any session thereof. The Legislature may also adopt, from time to time, any amendments, supplements and additions to the plan that it finds necessary or desirable, which amendments, supplements or additions may be adopted by concurrent resolution or by law.

(Added by Stats. 1959, c. 2053, p. 4748, § 2.)

CALIFORNIA WATER RESOURCES DEVELOPMENT ACT, CALIFORNIA WATER CODE

§ 12938. Deposit of proceeds; appropriation; funds for local areas; allocation; fiscal year

All proceeds from the sale of the bonds herein authorized shall be deposited in the fund as provided in Section 16757 of the Government Code and shall be available for the purpose provided in Section 12935, but, except only as to accrued interest and any premiums received on any sale, or sales, of the bonds, shall not be available for transfer to

the General Fund. All moneys deposited in the fund are hereby appropriated to the department for expenditure and allocation by the department without regard to fiscal years for the State Water Facilities as herein defined and, to the extent provided in this Section 12938, for additions to the State Water Resources Development System. Of the total amount of the bonds authorized herein, one hundred thirty million dollars ($130,000,000) and no more shall be available exclusively for the provision of water development facilities for local areas as set forth in subdivision (d) (6) of Section 12934. Any money in the California Water Fund, and any surplus revenue as described in Section 12937(b)4, available for expenditure for the State Water Resources System shall be used for the construction of the State Water Facilities in lieu of the proceeds of bonds authorized by this chapter. The use of the proceeds of bonds for such construction shall be decreased by an amount equal to that hereafter expended from the California Water Fund for the construction of State Water Facilities. To the extent that money is expended from the California Water Fund for construction of the State Water Facilities, proceeds from the sale of bonds authorized pursuant to this act in an equal amount, is appropriated and shall be expended for the construction of such additional facilities of the State Water Resources Development System as the department shall determine to be necessary and desirable to meet local needs, including, but not restricted to, flood control, and to augment the supplies of water in the Sacramento-San Joaquin Delta from multiple purpose dams, reservoirs, aqueducts and appurtenant works in the watersheds of the Sacramento, Eel, Trinity, Mad, Van Duzen and Klamath Rivers for use in the State Water Resources Development System, and the department is authorized to construct any and all facilities for which funds are appropriated to it for expenditure pursuant to this chapter. Such additional facilities for local needs shall

include those necessary to conserve or develop water which is tributary to the stream upon which any of the facilities of the State Water Resources Development System are constructed and it shall be the duty of the department to diligently plan such full development and submit plans and reports thereon to the Legislature. All moneys in the California Water Fund and all accruals thereto are hereby appropriated to the department for expenditure and allocation by the department without regard to fiscal years for the State Water Resources Development System as defined in Section 12931 except that in any fiscal year the Legislature may appropriate for any lawful purpose any money in the California Water Fund which is unexpended at the beginning of that fiscal year and any money accruing to that fund during the fiscal year.

Appendix L

California Public Resources Code,
Division 5, Chapter 1.4:

CALIFORNIA WILD AND SCENIC RIVERS ACT

5093.50. It is the policy of the State of California that certain rivers which possess extraordinary scenic, recreational, fishery or wildlife values, shall be preserved in their free-flowing state, together with their immediate environments, for the benefit and enjoyment of the people of the state. The Legislature declares that such use of these rivers is the highest and most beneficial use and is a reasonable and beneficial use of water within the meaning of Section 3 of Article XIV of the State Constitution. It is the purpose of this chapter to create a California Wild and Scenic Rivers System to be administered in accordance with the provisions of this chapter.

(As added by Stats. 1972, c. 1259, p. 2510, § 1, and effective through December 31, 1982.)

5093.51. This chapter shall be known as the California Wild and Scenic Rivers Act.

(As added by Stats. 1972, c. 1259, p. 2510, § 1.)

5093.52. As used in this chapter:

(a) "Secretary" means the Secretary of the Resources Agency.

(b) "Resources Agency" means the Secretary of the Resources Agency and such constituent units of the Resources Agency as the secretary deems necessary to accomplish the purposes of this chapter.

(c) "River" means the water, bed, and shoreline of rivers, streams, channels, lakes, bays, estuaries, marshes, wetlands and lagoons.

(d) "Free-flowing" means existing or flowing in a natural condition without artificial impoundment, diversion or other

modification of the waterway. The presence of low dams, diversion works, and other minor structures shall not automatically bar any river's inclusion within the system; provided, however, that this subdivision shall not be construed to authorize or encourage future construction of such structures on any component of the system.

(e) "System" means the California Wild and Scenic Rivers System.

(As added by Stats. 1972, c. 1259, p. 2510, § 1, and effective through December 31, 1982.)

5093.53. Those rivers or segments of rivers designated for inclusion in the system shall be classified by the secretary as one of the following:

(a) Wild rivers, which are those rivers or segments of rivers that are free of impoundments and generally inaccessible except by trail, with watersheds or shorelines essentially primitive and waters unpolluted.

(b) Scenic rivers, which are those rivers or segments of rivers that are free of impoundments, with shorelines or watersheds still largely primitive and shorelines largely undeveloped, but accessible in places by roads.

(c) Recreational rivers, which are those rivers or segments of rivers that are readily accessible by road or railroad, that may have some development along their shorelines, and that may have undergone some impoundment or diversion in the past.

(As added by Stats. 1972, c. 1259, p. 2510, § 1, and effective through December 31, 1982.)

5093.54. The following rivers are designated as components of the system:

(a) Klamath River. The main stem from 100 yards below Iron Gate Dam to the Pacific Ocean; the Scott River from the mouth of Shackleford Creek west of Fort Jones to the river mouth near Hamburg; the Salmon River from Cecil-

ville Bridge to the river mouth near Somesbar; the North Fork of the Salmon River from the intersection of the river with the south boundary of the Marble Mountain Wilderness Area to the river mouth; Wooley Creek, from the western boundary of the Marble Mountain Wilderness Area to its confluence with the Salmon River.

(b) Trinity River. The main stem from 100 yards below Lewiston Dam to the river mouth at Weitchpec; the North Fork of the Trinity from the intersection of the river with the southern boundary of the Salmon-Trinity Primitive Area downstream to the river mouth at Helena; New River from the intersection of the river with the southern boundary of the Salmon-Trinity Primitive Area downstream to the river mouth near Burnt Ranch; South Fork of the Trinity from the junction of the river with State Highway 36 to the river mouth near Salver.

(c) Smith River and all its tributaries, from the Oregon-California state boundary to the Pacific Ocean.

(d) Eel River. The main stem from 100 yards below Van Arsdale Dam to the Pacific Ocean; the South Fork of the Eel from the mouth of Section Four Creek near Branscomb to the river mouth below Weott; Middle Fork of the Eel from the intersection of the river with the southern boundary of the Middle Eel-Yolla Bolly Wilderness Area to the river mouth at Dos Rios; North Fork of the Eel from the Old Gilman Ranch downstream to the river mouth near Ramsey; Van Duzen River from Dinsmores Bridge downstream to the river mouth near Fortuna. It is the [illegible]ent of the Legislature, with respect to the Eel River and its tributaries, that after an initial period of 12 years following the effective date of this chapter, the Department of Water Resources shall report to the Legislature as to the need for water supply and flood control projects on the Eel River and its tributaries, and the Legislature shall hold public

hearings to determine whether legislation should be enacted to delete all or any segment of the river from the system.

(e) American River. The North Fork from its source to the Iowa Hill Bridge; the Lower American from Nimbus Dam to its junction with the Sacramento River.

(f) Other rivers which qualify for inclusion in the system may be recommended to the Legislature by the secretary.

(As added by Stats. 1972, c. 1259, p. 2510, § 1, and effective through December 31, 1982.)

5093.55. Except as provided in subdivision (d) of Section 5093.54, no dam, reservoir, or other water impoundment facility, other than temporary flood storage facilities permitted pursuant to Section 5093.57, shall be constructed on or directly affecting any river designated in Section 5093.54 after the effective date of this chapter; nor shall any water diversion facility be constructed on any such river unless and until the secretary determines that such facility is needed to supply domestic water to the residents of the county or counties through which the river flows, and unless and until the secretary determines that facility will not adversely affect its free-flowing condition or natural character.

(As added by Stats. 1972, c. 1259, p. 2510, § 1, and effective through December 31, 1982.)

5093.56. Except for geologic, hydrologic, economic, or any other technical studies deemed necesary or desirable by the Department of Water Resources in order to determine the feasibility of alternate sites for dams on the Eel River and its tributaries, which studies are hereby authorized, no department or agency of the state shall assist or cooperate, whether by loan, grant, license, or otherwise, with any department or agency of the federal, state, or local government, in the planning or construction of any project that

could have an adverse effect on the free-flowing, natural condition of the rivers included in the system.

(As added by Stats. 1972, c. 1259, p. 2510, § 1, and effective through December 31, 1982.)

5093.57. Nothing in this chapter shall be construed to prohibit any measures for flood protection, structural or nonstructural, necessary for the protection of lives and property along the Eel River as described in subdivision (d) of Section 5093.54, except for dams, reservoirs, or other water impoundment structures; provided, however, that such measures for flood protection may include facilities for temporary flood storage or flood storage basins on tributaries of the Eel River.

(As added by Stats. 1972, c. 1259, p. 2510, § 1.)

5093.58. The secretary shall do all of the following:

(a) Determine which of the classes described in Section 5093.53 best fit each segment of the rivers included in the system.

(b) Prepare a management plan to administer the rivers and their adjacent land areas in accordance with such classification.

(c) Submit such management plan to the Legislature for its approval.

(As added by Stats. 1972, c. 1259, p. 2510, § 1, and effective through December 31, 1982.)

5093.59. The secretary shall develop the management plan in close cooperation with the counties through which the rivers flow and their political subdivisions. Prior to adoption of any management plan, the secretary shall, after notice, hold a public hearing in each county through which the rivers flow and shall submit the plan to each county for its review as to the portion of the plan affecting the county.

(As added by Stats. 1972, c. 1259, p. 2510, § 1, and effective through December 31, 1982.)

5093.60. The secretary shall be responsible for the administration of the system. Each component of the system shall be administered so as to protect and enhance the values for which it was included in the system, without unreasonably limiting lumbering, grazing, and other resource uses, where the extent and nature of such uses do not conflict with public use and enjoyment of these values.

(As added by Stats. 1972, c. 1259, p. 2510, § 1, and effective through December 31, 1982.)

5093.61. All departments and agencies of the state and all local governmental agencies shall exercise their powers in a manner consistent with the provisions of this chapter. The Resources Agency shall cooperate with the appropriate water quality control agencies for the purpose of eliminating or diminishing the pollution of waters of the rivers included in the system.

(As added by Stats. 1972, c. 1259, p. 2510, § 1, and effective through December 31, 1982.)

5093.62. Nothing in this chapter shall affect the jurisdiction or responsibility or the state with regard to fish and wildlife. Hunting and fishing may be permitted on lands and waters administered as parts of the system under applicable state or federal laws and regulations.

(As added by Stats. 1972, c. 1259, p. 2510, § 1, and effective through December 31, 1982.)

5093.63. Nothing in this chapter shall be construed to permit or require the reservation, use, or taking of private property for scenic, fishery, wildlife, or recreation purposes, for inclusion in the system or for other public use, without just compensation.

(As added by Stats. 1972, c. 1259, p. 2510, § 1.)

5093.64. If any provision of this chapter or the application thereof to any person or circumstances is held in-

valid, such invalidity shall not affect other provisions or applications of the chapter which can be given effect without the invalid provision or application, and to this end the provisions of this chapter are severable.

(As added by Stats. 1972, c. 1259, p. 2510, § 1.)

5093.65. No construction of any dam, reservoir or other water impoundment facility shall be commenced prior to January 1, 1979, on the following portion of Kings River: The South (Main) Fork of the Kings River west of the western boundary of the Kings Canyon National Park (Cedar Grove area), and the Middle Fork of the Kings River west of the western boundary of the Kings Canyon National Park (Wilderness area), downstream to their confluence, and thence downstream to the entrance of their waters into Pine Flat Reservoir. It is not the intent of the Legislature by enactment of this section to designate any portion of the Kings River as a component of the system, and hydrologic, environmental, economic and engineering studies, surface and subsurface geologic exploration, and any other technical studies for the purpose of determining the feasibility of a multipurpose flood control, water conservation and hydroelectric project on such portion of Kings River may be undertaken by any local agency or private organization.

(As added by Stats. 1973, c. 499, p. 974, § 1.)

Appendix M

ASSEMBLY BILL NO. 1349

CHAPTER 1481

An act to amend Sections 5093.50, 5093.52, 5093.53, 5093.54, 5093.55, 5093.56, 5093.61, and 5093.62 of, to repeal and add Sections 5093.58 and 5093.60 of, to add Sections 5093.541, 5093.545, 5093.546, 5093.68, and 5093.69, and to repeal Section 5093.59 of, the Public Resources Code, relating to wild and scenic rivers.

(Approved by Governor September 27, 1982. Filed with Secretary of State September 28, 1982)

LEGISLATIVE COUNSEL'S DIGEST

AB 1349, Bosco. Wild and scenic rivers.

(1) Under the California Wild and Scenic Rivers Act, it is declared to be the state policy that certain rivers shall be preserved in their free-flowing state, together with their immediate environments.

This bill would define "immediate environments" to mean the land immediately adjacent to rivers designated as components of the system.

(2) Under the act, "free-flowing" is defined to mean existing or flowing in a natural condition without artificial impoundment, diversion, or other modification.

This bill would delete "in a natural condition" from that definition and make related changes.

(3) Under the act, the Smith River and all its tributaries from the Oregon boundary to the Pacific Ocean are included in the California Wild and Scenic Rivers System.

This bill would instead provide for the inclusion within the system of specified segments of the Smith River. The bill would prohibit the construction of any dam, reservoir, diversion, or other water impoundment facility on specified tributaries of the Smith River excluded from the system, and would provide for related matters.

(4) Under the act, no dam, reservoir, or other water impoundment facility may be constructed on or directly affecting any river included in the system.

This bill would limit the restriction to a dam, reservoir, diversion, or other water impoundment facility constructed on any such river, and would redefine "river" for purposes of the act to include only the shoreline up to the first line of permanently established riparian vegetation.

(5) Under the act, as a general matter, no state agency may assist or cooperate with any federal, state, or local entity, in the planning or construction of any project that could have an adverse effect on the free-flowing, natural condition of the rivers included in the system.

This bill would limit this restriction to the planning or construction of any dam, reservoir, diversion, or other water impoundment facility that could have an adverse effect on the free-flowing condition and natural character of the river segments included in the system.

(6) Under the act, the Secretary of the Resources Agency is required to classify rivers or segments of rivers included in the system as wild, scenic, or recreational, in accordance with specified criteria.

This bill would require the classification or reclassification of rivers or segments of rivers to be by statute, would revise and adopt as specified the classifications previously established by the secretary for all river segments within the system, and would permit the secretary to recommend legislation to classify or reclassify rivers, including specific land use restrictions relative to each classification.

(7) Under the act, the Secretary of the Resources Agency is responsible for the administration of the system and is directed to prepare a management plan to administer the rivers for submission to the Legislature for its approval.

This bill would delete the foregoing provisions and certain related provisions from the act. The bill would make the Resources Agency responsible for coordinating specified activities of state agencies with those of other state, local, and federal agencies.

The bill would declare that the act conveys no authority to adopt or implement any order, rule, regulation, guideline, or directive concerning land use regulation, as defined.

(8) The bill would also define "special treatment areas" for purposes of the act, provide for the responsibilities of timber operators and registered professional foresters regarding timber operations within those areas, make it a misdemeanor, with specified punishment, to commit violations of the provisions of the Z'berg-Nejedly Forest Practice Act of 1973, or of rules and regulations adopted pursuant thereto by the State Board of Forestry, regarding those operations, as well as impose civil penalties, and establish procedures for the issuance and extension of stop orders to prevent the continuation of those timber operations in violation of, or threatened violation of the provisions of, the Z'Berg-Nejedly Forest Practice Act of 1973 or of the rules and regulations adopted pursuant thereto, and provide for related matters.

(9) The bill would require the Resources Agency to conduct specified studies relative to the condition of the system and would require the Director of Fish and Game to conduct specified studies relative to salmon and steelhead habitat and the protection of fishery and wildlife values of the system.

(10) The bill would declare legislative intent relative to the effect of the bill on specified litigation and specified actions of the Secretary of the Interior.

(11) Article XIII B of the California Constitution and Sections 2231 and 2234 of the Revenue and Taxation Code

require the state to reimburse local agencies and school districts for certain costs mandated by the state. Other provisions require the Department of Finance to review statutes disclaiming these costs and provide, in certain cases, for making claims to the State Board of Control for reimbursement.

However, this bill would provide that no appropriation is made and no reimbursement is required by this act for a specified reason.

The people of the State of California do enact as follows:

SECTION 1. Section 5093.50 of the Public Resources Code is amended to read:

5093.50. It is the policy of the State of California that certain rivers which possess extraordinary scenic, recreational, fishery, or wildlife values shall be preserved in their free-flowing state, together with their immediate environments, for the benefit and enjoyment of the people of the state. The Legislature declares that such use of these rivers is the highest and most beneficial use and is a reasonable and beneficial use of water within the meaning of Section 2 of Article X of the California Constitution. It is the purpose of this chapter to create a California Wild and Scenic Rivers System to be administered in accordance with the provisions of this chapter.

SEC. 2. Section 5093.52 of the Public Resources Code is amended to read:

5093.52. As used in this chapter:

(a) "Secretary" means the Secretary of the Resources Agency.

(b) "Resources Agency" means the Secretary of the Resources Agency and such constituent units of the Resources Agency as the secretary deems necessary to accomplish the purposes of this chapter.

(c) "River" means the water, bed, and shoreline of rivers, streams, channels, lakes, bays, estuaries, marshes, wetlands and lagoons, up to the first line of permanently established riparian vegetation.

(d) "Free-flowing" means existing or flowing without artificial impoundment, diversion, or other modification of the river. The presence of low dams, diversion works, and other minor structures shall not automatically bar any river's inclusion within the system; provided, however, that this subdivision shall not be construed to authorize or encourage future construction of such structures on any component of the system.

(e) "System" means the California Wild and Scenic Rivers System.

(f) "Land use regulation" means the regulation by any state or local governmental entity, agency, or official of any activities which take place other than directly on the waters of the segments of the rivers designated in Section 5093.54.

(g) "Director" means the Director of Fish and Game.

(h) "Immediate environments" means the land immediately adjacent to the segments of the rivers designated in Section 5093.54.

(i) "Special treatment areas" means, for the purpose of this chapter, those areas defined as special treatment areas in Section 895.1 of Title 14 of the California Administrative Code, as in effect on January 1, 1981, as such definition is applicable to wild and scenic river segments designated from time to time in Section 5093.54.

(j) "Board" means the Board of Forestry.

SEC. 3. Section 5093.53 of the Public Resources Code is amended to read:

5093.53. Those rivers or segments of rivers included in the system shall be classified as one of the following:

(a) Wild rivers, which are those rivers or segments of rivers that are free of impoundments and generally inaccessible except by trail, with watersheds or shorelines essentially primitive and waters unpolluted.

(b) Scenic rivers, which are those rivers or segments of rivers that are free of impoundments, with shorelines or watersheds still largely primitive and shorelines largely undeveloped, but accessible in places by roads.

(c) Recreational rivers, which are those rivers or segments of rivers that are readily accessible by road or railroad, that may have some development along their shorelines, and that may have undergone some impoundment or diversion in the past.

SEC. 4. Section 5093.54 of the Public Resources Code is amended to read:

5093.54. The following rivers and segments thereof are designated as components of the system:

(a) Klamath River. The main stem from 100 yards below Iron Gate Dam to the Pacific Ocean; the Scott River from the mouth of Shackleford Creek west of Fort Jones to the river mouth near Hamburg; the Salmon River from Cecilville Bridge to the river mouth near Somesbar; the North Fork of the Salmon River from the intersection of the river with the south boundary of the Marble Mountain Wilderness Area to the river mouth; Wooley Creek from the western boundary of the Marble Mountain Wilderness Area to its confluence with the Salmon River.

(b) Trinity River. The main stem from 100 yards below Lewiston Dam to the river mouth at Weitchpec; the North Fork of the Trinity from the intersection of the river with the southern boundary of the Salmon-Trinity Primitive Area downstream to the river mouth at Helena; New River from the intersection of the river with the southern boun-

dary of the Salmon-Trinity Primitive Area downstream to the river mouth near Burnt Ranch; South Fork of the Trinity from the junction of the river with State Highway Route 36 to the river mouth near Salyer.

(c) Smith River. The main stem from the confluence of the Middle and South Forks to its mouth at the Pacific Ocean; the Middle Fork from its source about three miles south of Sanger Lake as depicted on 1956 USGS 15′ "Preston Peak" topographic map to the middle of Section 7 T17N R5E; the Middle Fork from the middle of Section 7 T17N R5E to the middle of Section 6 T17N R5E; the Middle Fork from the middle of Section 6 T17N R5E to one-half mile upstream from the confluence with Knopki Creek; the Middle Fork from one-half mile upstream from the confluence with Knopki Creek to the confluence with the South Fork; Myrtle Creek from its source in Section 9 T17N R1E as depicted on 1952 USGS 15′ "Crescent City" topographic map to the middle of Section 28 T17N R1E; Myrtle Creek, from the middle of Section 28 T17N R1E to the confluence with the Middle Fork; Shelly Creek from its source in Section 1 T18N R3E as depicted on 1951 USGS 15′ "Gasquet" topographic map to the confluence with Patrick Creek; Kelly Creek from its source in Section 32 T17N R3E as depicted on 1951 USGS 15′ "Gasquet" topographic map to the confluence with the Middle Fork; Packsaddle Creek from its source about 0.8 miles southwest of Broken Rib Mountain as depicted on 1956 USGS 15′ "Preston Peak" topographic map to the eastern boundary of Section 3 T17N R1E; Packsaddle Creek from the eastern boundary of Section 3 T17N R4E to the northern boundary of Section 3 T17N R4E; Packsaddle Creek from the northern boundary of Section 3 T17N R4E to the confluence with the Middle Fork; East Fork Patrick Creek from its source in Section 10 T18N R3E as depicted on 1951 USGS 15′ "Gasquet" topographic map to the confluence with West

Fork Patrick Creek; West Fork Patrick Creek from its source in Section 18 T18N R3E as depicted on 1951 15′ "Gasquet" topographic map to the confluence with East Fork Patrick Creek; Griffin Creek from its source about 0.2 miles southwest of Hazel View Summit as depicted on 1956 USGS 15′ "Preston Peak" topographic map to the confluence with the Middle Fork; Knopki Creek from its source about 0.4 miles west of Sanger Peak as depicted on 1956 USGS 15′ "Preston Peak" topographic map to the confluence with Middle Fork; Monkey Creek from its source in the northeast quadrant of Section 12 T18N R3E as depicted on 1951 USGS 15′ "Gasquet" topographic map to the northern boundary of Section 26 T18N R3E; Monkey Creek from the northern boundary of Section 26 T18N R3E to the confluence with the Middle Fork; Patrick Creek from the junction of the East and West Forks of Patrick Creek to the confluence with Middle Fork; the North Fork from the California-Oregon boundary to the confluence with an unnamed tributary in the northern quarter Section 5 T18N R2E as depicted on 1951 USGS 15′ "Gasquet" topographic map; the North Fork from the confluence with an unnamed tributary in northern quarter of Section 5 T18N R2E to the southern-most intersection of eastern boundary Section 5 T18N R2E as depicted on 1951 USGS 15′ "Gasquet" topographic map; the North Fork from the southern-most intersection of the eastern boundary Section 5 T18N R2E as depicted on 1951 USGS 15′ "Gasquet" topographic map to the confluence with Stony Creek; the North Fork from the confluence with Stony Creek to the confluence with the Middle Fork; Diamond Creek from the California-Oregon state boundary to the confluence with High Plateau Creek; Diamond Creek from the confluence with High Plateau Creek to the confluence with the North Fork; Bear Creek from its source in Section 24 T18N R2E as depicted on 1951 USGS 15′ "Gasquet" topographic map to the confluence with Diamond Creek; Still Creek from its source in Section 11 T18N

R1E as depicted on 1952 USGS 15′ "Crescent City" topographic map to the confluence with the North Fork Smith River; North Fork Diamond Creek from the California-Oregon state boundary to the confluence with Diamond Creek; High Plateau Creek from its source in Section 26 T18N R2E as depicted on 1951 USGS 15′ "Gasquet" topographic map to northern boundary Section 23 T18N R2E; High Plateau Creek from the northern boundary Section 23 T18N R2E to the confluence with Diamond Creek; the Siskiyou Fork from its source about 0.7 miles southeast of Broken Rib Mountain as depicted on 1956 USGS 15′ "Preston Peak" topographic map to the confluence with the South Siskiyou Fork; the Siskiyou Fork from its confluence with the South Siskiyou Fork to the confluence with the Middle Fork; the South Siskiyou Fork from its source about 0.6 miles southwest of Buck Lake as depicted on 1956 USGS 15′ "Preston Peak" topographic map to the confluence with the Siskiyou Fork; the South Fork from its source about 0.5 miles southwest of Bear Mountain as depicted on 1956 USGS 15′ "Preston Peak" topographic map to Blackhawk Bar; the South Fork from Blackhawk Bar to the confluence with the Middle Fork; Williams Creek from its source in Section 31 T14N R4E as depicted on 1952 USGS 15′ "Ship Mountain" topographic map to the confluence with Eight Mile Creek; Eight Mile Creek from its source in Section 29 T14N R4E as depicted on 1955 USGS 15′ "Dillon Mountain" topographic map to the confluence with the South Fork; the Prescott Fork from its source about 0.5 miles southeast of Island Lake as depicted on 1955 USGS 15′ "Dillon Mountain" topographic map to the confluence with the South Fork; Quartz Creek from its source in Section 31 T16N R4E as depicted on 1952 USGS 15′ "Ship Mountain" topographic map to the confluence with the South Fork; Jones Creek from its source in Section 36 T16N R3E as depicted on 1952 USGS 15′ "Ship Mountain" topographic map to the middle of Section 5 T15N R3E;

Jones Creek from the middle of Section 5 T15N R3E to the confluence with the South Fork; Hurdygurdy Creek from its source about 0.4 miles southwest of Bear Basin Butte as depicted on 1956 USGS 15′ "Preston Peak" topographic map to the confluence with the South Fork; Gordon Creek from its source in Section 18 T16N R3E as depicted on 1951 USGS 15′ "Gasquet" topographic map to the confluence with the South Fork; Coon Creek from the junction of the two-source tributaries in the southwest quadrant of Section 31 T17N R3E as depicted on 1951 USGS 15′ "Gasquet" topographic map to the western boundary Section 14 T16N R2E; Coon Creek from the western boundary Section 14 T16N R2E to the confluence with the South Fork; Craigs Creek from its source in Section 36 T17N R2E as depicted on 1951 USGS 15′ "Gasquet" topographic map to the confluence with the South Fork; Buck Creek from its source at Cedar Camp Spring as depicted on 1952 USGS 15′ "Ship Mountain" topographic map to the confluence with the South Fork; Muzzleloader Creek from its source in Section 2 T15N R3E as depicted on 1952 USGS 15′ "Ship Mountain" topographic map to the confluence with Jones Creek; Canthook Creek from its source in Section 2 T15N R2E as depicted on 1952 USGS 15′ "Ship Mountain" topographic map to the confluence with South Fork.

(d) Eel River. The main stem from 100 yards below Van Arsdale Dam to the Pacific Ocean; the South Fork of the Eel from the mouth of Section Four Creek near Branscomb to the river mouth below Weott; Middle Fork of the Eel from the intersection of the river with the southern boundary of the Middle Eel-Yolla Bolly Wilderness Area to the river mouth at Dos Rios; North Fork of the Eel from the Old Gilman Ranch downstream to the river mouth near Ramsey; Van Duzen River from Dinsmores Bridge downstream to the river mouth near Fortuna. It is the intent of the Legislature, with respect to the Eel River and its tributaries, that after an initial period of 12

years following the effective date of this chapter, the Department of Water Resources shall report to the Legislature as to the need for water supply and flood control projects on the Eel River and its tributaries, and the Legislature shall hold public hearings to determinne whether legislation should be enacted to delete all or any segment of the river from the system.

(e) American River. The North Fork from its source to the Iowa Hill Bridge; the Lower American from Nimbus dam to its junction with the Sacramento River.

(f) Other rivers which qualify for inclusion in the system may be recommended to the Legislature by the secretary.

SEC. 5. Section 5093.541 is added to the Public Resources Code, to read:

5093.541. (a) Notwithstanding the fact that the tributaries of the Smith River specified in this subdivision are not included in the system, no dam, reservoir, diversion, or other water impoundment facility shall be constructed on any of the following tributaries of the Smith River:

(1) Dominie Creek.

(2) Rowdy Creek.

(3) South Fork Rowdy Creek.

(4) Savoy Creek.

(5) Little Mill Creek.

(6) Bummer Lake Creek.

(7) East Fork Mill Creek.

(8) West Branch Mill Creek.

(9) Rock Creek.

(10) Goose Creek.

(11) East Fork Goose Creek.

(12) Mill Creek.

(b) All state agencies exercising powers under any other provision of law with respect to the protection and restoration of fishery resources shall continue to exercise those powers in a manner to protect and restore fishery resources in the tributaries specified in subdivision (a). In carrying out the provisions of this subdivision, any exercise of powers shall be consistent with the provisions of Section 5093.58.

SEC. 6. Section 5093.545 is added to the Public Resources Code, to read:

5093.545. The classifications heretofore established by the secretary for the rivers or segments of rivers included in the system are revised and adopted as follows:

Rivers	Classification
(a) Klamath River: The Klamath River from the FERC Project 2082 downstream boundary in Section 17 T47N R5W as shown on Exhibit K-7 sheet 1 dated May 25, 1962, to the river mouth at the Pacific Ocean	Recreational
(b) Scott River:	
(1) The Scott River from Shackleford Creek to McCarthy Creek	Recreational
(2) The Scott River from McCarthy Creek to Scott Bar	Scenic
(3) The Scott River from Scott Bar to the confluence with the Klamath River	Recreational
(c) Salmon River:	
(1) The Salmon River from the Forks of Salmon to the Lewis Creek confluence	Recreational
(2) The Salmon River from the Lewis Creek confluence to the Wooley Creek confluence	Scenic
(3) The Salmon River from the Wooley Creek confluence to the confluence with the Klamath River	Recreational
(4) The South Fork of the Salmon River from Cecilville to St. Claire Creek confluence	Recreational

Rivers	Classification
(5) The South Fork from St. Claire Creek confluence to the Matthews Creek confluence	Scenic
(6) The South Fork from Matthews Creek confluence to the Forks of Salmon	Recreational
(7) The North Fork of the Salmon River from Marble Mountain Wilderness boundary to Mule Bridge Campground in Section 35 T12N R11W and Section 12 T11N R11W	Wild
(8) The North Fork from Mule Bridge Campground to the Forks of Salmon	Recreational
(9) Wooley Creek from the Marble Mountain Wilderness Area boundary to ½ mile upstream of the confluence with Salmon River	Wild
(10) Wooley Creek downstream most ½ mile above the confluence with the Salmon River	Recreational
(d) Trinity River:	
(1) The Trinity River from 100 yards below Lewiston Dam to Cedar Flat Creek confluence	Recreational
(2) The Trinity River from Cedar Flat Creek confluence to Gray Falls	Scenic
(3) The Trinity River from Gray Falls to the west boundary of Section 2 T8N R4E	Recreational
(4) The Trinity River from the west boundary of Section 2 T8N R4E to the confluence with the Klamath River at Weitchpec	Scenic
(5) The North Fork of the Trinity River from the Trinity Alps Primitive Area boundary to north boundary Section 20 T34N R11W	Wild
(6) The North Fork from the north boundary Section 20 T34N R11W to mouth	Recreational
(7) The South Fork Trinity River from Forest Glen to Hidden Valley Ranch	Wild

Rivers	Classification
(8) The South Fork from Hidden Valley Ranch to the Naufus Creek confluence in Section 8 T1N R7E	Scenic
(9) The South Fork from the Naufus Creek confluence in Section 8 T1N R7E to Johnson Creek confluence near the boundary of Sections 13 and 14 T2N R6E	Wild
(10) The South Fork from Johnson Creek confluence near the boundary of Sections 13 and 14 T2N R6E to the boundary of Sections 25 and 36 T2N R6E	Scenic
(11) The South Fork from the boundary of Section 25 and 36 T2N R6E to the footbridge near the mouth of Underwood Creek in Section 17 T4N R6E Humboldt Base and Meridian	Recreational
(12) The South Fork from the footbridge near the mouth of Underwood Creek in Section 17 T4N R6E to Todd Ranch in Section 18 T5N R5E	Wild
(13) The South Fork from Todd Ranch in Section 18 T5N R5E to the confluence with Main Trinity	Scenic
(14) New River from the Salmon Trinity Primitive Area boundary to the junction with the East Fork New River in Section 23 T7N R7E	Wild
(15) New River from the Junction with the East Fork New River in Section 23 T7N R7E to 100 yards below Panther Creek Campground in Section 18 T6N R7E	Recreational
(16) New River from 100 yards below Panther Creek Campground in Section 18 T6N R7E to Dyer Creek confluence in Section 25 T26N R6E	Scenic
(17) New River from Dyer Creek confluence in Section 25 T26N R6E to the confluence with Trinity River	Wild

Rivers	Classification
(e) Smith River:	
(1) Smith River from the confluence of the Middle and South Forks to its mouth at the Pacific Ocean	Recreational
(2) Middle Fork Smith River from its source about 3 miles south of Sanger Lake as depicted on 1956 USGS 15′ "Preston Peak" topographic map to the middle of Section 7 T17N R5E	Wild
(3) Middle Fork Smith River from the middle of Section 7 T17N R5E to the middle of Section 6 T17N R5E	Scenic
(4) Midle Fork Smith River from middle of Section 6 T17N R5E to one-half mile upstream from the confluence with Knopki Creek	Wild
(5) Middle Fork Smith River from one-half mile upstream from the confluence with Knopki Creek to the confluence with South Fork Smith River	Recreational
(6) Myrtle Creek from its source in Section 9 T17N R1E as depicted on 1952 USGS 15′ "Crescent City" topographic map to the middle of Section 28 T17N R1E	Recreational
(7) Myrtle Creek from the middle of Section 28 T17N R1E to the confluence with the Middle Fork Smith River	Recreational
(8) Shelly Creek from its source in Section 1 T18N R3E as depicted on 1951 USGS 15′ "Gasquet" topographic map to the confluence with Patrick Creek	Recreational
(9) Kelly Creek from its source in Section 32 T17N R3E as depicted on 1951 USGS 15′ "Gasquet" topographic map to the confluence with the Middle Fork Smith River	Recreational
(10) Packsaddle Creek from its source about 0.8 miles southwest of Broken Rib Mountain as depicted on 1956 USGS 15′ "Preston Peak" topographic map to the eastern boundary of Section 3 T17N R1E	Recreational

Rivers	Classification
(11) Packsaddle Creek from the eastern boundary of Section 3 T17N R4E to the northern boundary of Section 3 T17N R4E	Recreational
(12) Packsaddle Creek from the northern boundary of Section 3 T17N R4E to the confluence with the Middle Fork of Smith River	Recreational
(13) East Fork Patrick Creek from its source in Section 10 T18N R3E as depicted on 1951 USGS 15′ "Gasquet" topographic map to the confluence with the West Fork Patrick Creek	Recreational
(14) West Fork Patrick Creek from its source in Section 18 T18N R3E as depicted on 1951 15′ "Gasquet" topographic map to the confluence with the East Fork Patrick Creek	Recreational
(15) Griffin Creek from its source about 0.2 miles southwest of Hazel View Summit as depicted on 1956 USGS 15′ "Preston Peak" topographic map to the confluence with the Middle Fork Smith River	Recreational
(16) Knopki Creek from its source about 0.4 miles west of Sanger Peak as depicted on 1956 USGS 15′ "Preston Peak" topographic map to the confluence with the Middle Fork Smith River	Recreational
(17) Monkey Creek from its source in the northeast quadrant of Section 12 T18N R3E as depicted on 1951 USGS 15′ "Gasquet" topographic map to the northern boundary of Section 26 T18N R3E	Recreational
(18) Monkey Creek from the northern boundary of Section 26 T18N R3E to the confluence with the Middle Fork of Smith River	Recreational
(19) Patrick Creek from the junction of East and West Forks of Patrick Creek to the confluence with the Middle Fork Smith River	Recreational

Rivers	Classification
(20) North Fork Smith River from the California-Oregon boundary to the confluence with an unnamed tributary in the northern quarter Section 5 T18N R2E as depicted on 1951 USGS 15' "Gasquet" topographic map	Wild
(21) North Fork Smith River from the confluence with an unnamed tributary in the northern quarter of Section 5 T18N R2E to the southern-most intersection of the eastern boundary of Section 5 T18N R2E as depicted on 1951 USGS 15' "Gasquet" topographic map	Scenic
(22) North Fork Smith River from the southern-most intersection of the eastern boundary Section 5 T18N R2E as depicted on 1951 USGS 15' "Gasquet" topographic map to the confluence with Stony Creek	Wild
(23) North Fork Smith River from the confluence with Stony Creek to the confluence with the Middle Fork of the Smith River	Recreational
(24) Diamond Creek from the California-Oregon state boundary to the confluence with High Plateau Creek	Recreational
(25) Diamond Creek from the confluence with High Plateau Creek to the confluence with the North Fork Smith River	Recreational
(26) Bear Creek from its source in Section 24 T18N R2E as depicted on 1951 USGS 15' "Gasquet" topographic map to the confluence with Diamond Creek	Recreational
(27) Still Creek from its source in Section 11 T18N R1E as depicted on 1952 USGS 15' "Crescent City" topographic map to the confluence with the North Fork Smith River	Recreational
(28) North Fork Diamond Creek from the California-Oregon state boundary to the confluence with Diamond Creek	Recreational

Rivers	Classification
(29) High Plateau Creek from its source in Section 26 T18N R2E as depicted on 1951 USGS 15′ "Gasquet" topographic map to the northern boundary Section 23 T18N R2E	Recreational
(30) High Plateau Creek from the northern boundary Section 23 T18N R2E to the confluence with Diamond Creek	Recreational
(31) Siskiyou Fork of Smith River from its source about 0.7 miles southeast of Broken Rib Mountain as depicted on 1956 USGS 15′ "Preston Peak" topographic map to the confluence with the South Siskiyou Fork of the Smith River	Wild
(32) Siskiyou Fork of the Smith River from the confluence with the South Siskiyou Fork of the Smith River to the confluence with the Middle Fork of the Smith River	Recreational
(33) South Siskiyou Fork of the Smith River from its source about 0.6 miles southwest of Buck Lake as depicted on 1956 USGS 15′ "Preston Peak" topographic map to the confluence with the Siskiyou Fork of the Smith River	Wild
(34) South Fork Smith River from its source about 0.5 mile southwest of Bear Mountain as depicted on 1956 USGS 15′ "Preston Peak" topographic map to Blackhawk Bar	Wild
(35) South Fork Smith River from Blackhawk Bar to the confluence with the Middle Fork Smith River	Recreational
(36) Williams Creek from its source in Section 31 T14N R4E as depicted on 1952 USGS 15′ "Ship Mountain" topographic map to the confluence with Eight Mile Creek	Recreational
(37) Eight Mile Creek from its source in Section 29 T14N R4E as depicted on 1955 USGS 15′ "Dillon Mtn." topographic map to the confluence with the South Fork Smith River	Recreational

Rivers	Classification
(38) Prescott Fork of the Smith River from its source about 0.5 miles southeast of Island Lake as depicted on 1955 USGS 15' "Dillon Mtn." topographic map to the confluence with the South Fork Smith River ..	Recreational
(39) Quartz Creek from its source in Section 31 T16N R4E as depicted on 1952 USGS 15' "Ship Mountain" topographic map to the confluence with the South Fork Smith River	Recreational
(40) Jones Creek from its source in Section 36 T16N R3E as depicted on 1952 USGS 15' "Ship Mountain" topographic map to the middle of Section 5 T15N R3E	Recreational
(41) Jones Creek from the middle of Section 5 T15N R3E to the confluence with the South Fork of the Smith River	Recreational
(42) Hurdygurdy Creek from its source about 0.4 miles southwest of Bear Basin Butte as depicted on 1956 USGS 15' "Preston Peak" topographic map to the confluence with the South Fork Smith River	Recreational
(43) Gordon Creek from its source in Section 18 T16N R3E as depicted on 1951 USGS 15' "Gasquet" topographic map to the confluence with the South Fork Smith River	Recreational
(44) Coon Creek from the junction of the two source tributaries in the southwest quadrant of Section 31 T17N R3E as depicted on 1951 USGS 15' "Gasquet" topographic map to the western boundary of Section 14 T16N R2E	Recreational
(45) Coon Creek from the western boundary of Section 14 T16N R2E to the confluence with the South Fork Smith River ..	Recreational
(46) Craigs Creek from its source in Section 36 T17N R2E as depicted on 1951 USGS 15' "Gasquet" topographic map to the confluence with the South Fork Smith River	Recreational

Rivers	Classification
(47) Buck Creek from its source at Cedar Camp Spring as depicted on 1952 USGS 15' "Ship Mountain" topographic map to the confluence with the South Fork Smith River	Recreational
(48) Muzzleloader Creek from its source in Section 2 T15N R3E as depicted on 1952 USGS 15' "Ship Mountain" topographic map to the confluence with Jones Creek	Recreational
(49) Canthook Creek from its source in Section 2 T15N R2E as depicted on 1952 USGS 15' "Ship Mountain" topographic map to the confluence with the South Fork Smith River	Recreational
(f) Eel River:	
(1) The Eel River from 100 yards below Van Arsdale Dam to the confluence with Tomki Creek	Recreational
(2) The Eel River from the confluence with Tomki Creek to the middle of Section 22 T19N R12W	Scenic
(3) The Eel River from the middle of Section 22 T19N R12W to the boundary between Sections 7 and 8 T19N R12W	Recreational
(4) The Eel River from the boundary between Sections 7 and 8 T19N R12W to the confluence with Outlet Creek	Wild
(5) The Eel River from the confluence with Outlet Creek to the mouth at the Pacific Ocean	Recreational
(6) The South Fork of the Eel River from the mouth of Section Four Creek near Branscomb	Recreational
(7) The South Fork of the Eel River from Horseshoe Bend to the middle of Section 29 T23N R16W	Wild
(8) The South Fork of the Eel River from the middle of Section 29 T23N R16W to the confluence with the main Eel near Weott	Recreational

Rivers	Classification
(9) Middle Fork of the Eel River from the intersection of the river with the southern boundary of the Middle Eel-Yolla Bolly Wilderness Area to the Eel River Ranger Station	Wild
(10) The Middle Fork of the Eel River from Eel River Ranger Station to Williams Creek	Recreational
(11) The Middle Fork of the Eel River from Williams Creek to the southern boundary of the northern quarter of Section 25 T22N R12W	Scenic
(12) The Middle Fork of the Eel River from the southern boundary of the northern quarter of Section 25 T22N R12W to the boundary between Sections 4 ad 5 T21N R13W	Wild
(13) The Midle Fork of the Eel River from the boundary between Sections 4 and 5 T21N R13W to the confluence with main Eel at Dos Rios	Recreational
(14) The North Fork of the Eel River from the Old Gilman Ranch to the middle of Section 8 T24N R13W	Wild
(15) The North Fork of the Eel River from the middle of Section 8 T24N R13W to the boundary between Sections 12 and 13 T24N R14W	Recreational
(16) The North Fork of the Eel River from the boundary between Sections 12 and 13 T24N R14W to the confluence with main Eel	Wild
(g) Van Duzen River:	
(1) The Van Duzen River from the Dinsmore Bridge to the powerline crossing above Little Larribee Creek	Scenic
(2) The Van Duzen River from the powerline crossing above Little Larribee Creek to the confluence with Eel River	Recreational

Rivers	Classification
(h) Lower American River: The Lower American River from Nimbus Dam to its junction with the Sacramento River	Recreational
(i) North Fork American River:	
(1) The North Fork from the source of the North Fork American River to two and one-half miles above the Forest Hill-Soda Springs Road	Wild
(2) The North Fork from two and one-half miles above the Forest Hill-Soda Springs Road, to one-half mile below the Forest Hill-Soda Springs Road	Scenic
(3) The North Fork from one-half mile below the Forest Hill-Soda Springs Road to one-quarter mile above the Iowa Hill Bridge	Wild
(4) The North Fork from one-quarter mile above the Iowa Hill Bridge to the Iowa Hill Bridge	Scenic

SEC. 7. Section 5093.546 is added to the Public Resources Code, to read:

5093.546. Classification or reclassification of rivers or segments of rivers within the system as wild, scenic, or recreational shall be by statute. The secretary may recommend legislation to classify or reclassify rivers or segments of rivers within the system, and may include specific land use restrictions relative to each particular classification in such recommendations.

SEC. 8. Section 5093.55 of the Public Resources Code is amended to read:

5093.55. Except as provided in subdivision (d) of Section 5093.54, no dam, reservoir, diversion, or other water impoundment facility, other than temporary flood storage facilities permitted pursuant to Section 5093.57, shall be constructed on any river designated in Section 5093.54

after the effective date of this chapter; nor shall any water diversion facility be constructed on any such river unless and until the secretary determines that such facility is needed to supply domestic water to the residents of the county or counties through which the river flows, and unless and until the secretary determines that facility will not adversely affect its free-flowing condition and natural character.

SEC. 9. Section 5093.56 of the Public Resources Code is amended to read:

5093.56. Except for geologic, hydrologic, economic, or any other technical studies deemed necessary or desirable by the Department of Water Resources in order to determine the feasibility of alternate sites for dams on the Eel River and its tributaries, which studies are hereby authorized, no department or agency of the state shall assist or cooperate, whether by loan, grant, license, or otherwise, with any department or agency of the federal, state, or local government, in the planning or construction of any dam, reservoir, diversion, or other water impoundment facility that could have an adverse effect on the free-flowing condition and natural character of the river segments designated in Section 5093.54 as included in the system.

SEC. 10. Section 5093.58 of the Public Resources Code is repealed.

SEC. 11. Section 5093.58 is added to the Public Resources Code, to read:

5093.58. This chapter neither diminishes the power of the secretary or any other state or local official or agency under any other statute, nor conveys any authority, express or implied, to the secretary or any state or local agency, commission, board, or official to adopt or implement any interim or permanent order, rule, regulation, guideline, or directive concerning land use regulation.

SEC. 12. Section 5093.59 of the Public Resources Code is repealed.

SEC.13. Section 5093.60 of the Public Resources Code is repealed.

SEC. 14. Section 5093.60 is added to the Public Resources Code, to read:

5093.60. The Resources Agency shall be responsible for coordinating the activities of state agencies whose activities affect the rivers in the system with those of other state, local, and federal agencies with jurisdiction over matters which may affect the rivers.

SEC. 15. Section 5093.61 of the Public Resources Code is amended to read:

5093.61. All departments and agencies of the state and all local governmental agencies shall exercise their powers granted under any other provision of law in a manner consistent with the policy and provisions of this chapter.

SEC. 16. Section 5093.62 of the Public Resources Code is amended to read:

5093.62. Nothing in this chapter shall affect the jurisdiction or responsibility of the state with regard to fish, wildlife, or their habitat. Hunting and fishing may be permitted on lands and waters administered as parts of the system under applicable state or federal laws and regulations.

SEC. 17. Section 5093.68 is added to the Public Resources Code, to read:

5093.68. (a) Within the boundaries of special treatment areas, all of the following provisions shall apply, in addition to any other provisions whether by statute or regulation:

(1) A timber operator, whether licensed or not, shall be responsible for the actions of his or her employees. The

registered professional forester who prepares and signs a timber harvesting plan, a timber management plan, or a notice of timber operations shall be responsible for its contents but shall not be responsible for implementation or execution of the plan or notice unless employed for that purpose.

(2) Any registered professional forester preparing a timber harvest plan shall certify that he or she or a qualified representative has personally inspected the plan area on the ground.

(3) Any person operating within the special treatment area who willfully violates any provision of Chapter 8 (commencing with Section 4511) of Division 4 or any rule or regulation of the State Board of Forestry adopted pursuant thereto that results in significant environmental damage shall be guilty of a misdemeanor punishable by a fine of not less than five hundred dollars ($500) or more than five thousand dollars ($5,000) or imprisonment for not more than one year in the county jail, or both. The person shall also be subject to civil damages to the state not to exceed ten thousand dollars ($10,000) for each misdemeanor violation.

(4) The Director of Forestry may require a bond or other evidence of financial responsibility from any timber operator whose ability to pay the civil damages provided for herein is reasonably deemed to be uncertain.

(b) In order to temporarily suspend timber operations which are being conducted within special treatment areas adajcent to wild and scenic rivers designated pursuant to Section 5093.54, while judicial remedies are pursued pursuant to this section, an inspecting forest officer of the Department of Forestry may issue a written timber operations stop order if, upon reasonable cause, the officer determines that a timber operation is being conducted or is about to be conducted in violation of Chapter 8 (commenc-

ing with Section 4511) of Division 4, or of rules and regulations adopted pursuant thereto, and that the violation or threatened violation would result in imminent and substantial damage to soil, water, or timber resources or to fish and wildlife habitat. A stop order shall apply only to those acts or omissions that are the proximate cause of the violation or that are reasonably foreseen would be the proximate cause of a violation. The stop order shall be effective immediately and throughout the next day.

(c) A supervising forest officer may, after an onsite investigation, extend a stop order issued pursuant to subdivision (b) for up to five days, excluding Saturday and Sunday, provided that he or she finds that the original stop order was issued upon reasonable cause. A stop order shall not be issued or extended for the same act or omission more than one time.

(d) Each stop order shall identify the specific act or omission that constitutes a violation or that is foreseen would constitute a violation, the specific timber operation that is to be stopped, and any corrective or mitigative actions that may be required.

(e) The Department of Forestry may terminate the stop order if the timber operator enters into a written agreement with the department assuring that he or she will resume operations in compliance with the provisions of Chapter 8 (commencing with Section 4511) of Division 4, and with the rules and regulations adopted pursuant thereto, and will correct any violation. The department may require a reasonable cash deposit or bond payable to the department as a condition of compliance with the agreement.

(f) Notice of the issuance of a stop order or an extension of a stop order shall be deemed to have been made to all persons working on the timber operation when a copy of the

written order is delivered to the person in charge of operations at the time the order is issued or, if no persons are present at that time, then by posting a copy of the order conspicuously on the yarder or log loading equipment at a currently active landing on the timber operations site. If no persons are present at the site when the order is issued, the issuing officer shall deliver a copy of the order to the timber operator either in person or to the operator's address of record prior to the commencement of the next working day.

(g) As used in this section, "forest officer" means a registered professional forester employed by the Department of Forestry in a civil service classification of forester II or higher grade.

(h) (1) Failure of the timber operator or an employee of the timber operator, after receiving notice pursuant to this section, to comply with a validly issued stop order is a violation of this section and is punishable as provided in paragraph (3) of subdivision (a); provided, however, that, in all cases, the timber operator, and not an employee of the operator or any other person, shall be charged with that violation.

Each day or portion thereof that the violation continues shall constitute a new and separate offense.

(2) In determining the penalty for any timber operator guilty of violating a validly issued stop order, the court shall take into consideration all relevant circumstances, including, but not limited to, the following:

(A) The extent of harm to soil, water, or timber resources or to fish and wildlife habitat.

(B) Corrective action, if any, taken by the defendant.

(i) Nothing in this section shall prevent a timber operator from seeking an alternative writ as prescribed in Chap-

ter 2 (commencing with Section 1084) of Title 1 of Part 3 of the Code of Civil Procedure, or as provided by any other provision of law.

(j) (1) If a timber operator believes that a forest officer lacked reasonable cause to issue or extend a stop order pursuant to this section, the timber operator may present a claim to the State Board of Control pursuant to Part 3 (commencing with Section 900) of Title 1 of the Government Code for compensation and damages resulting from the stopping of timber operations.

(2) If the State Board of Control finds that the forest officer lacked reasonable cause to issue or extend the stop order, the board shall award a sum of not less than one hundred dollars ($100), nor more than one thousand dollars ($1,000), per day for each day the order was in effect.

SEC. 18. Section 5093.69 is added to the Public Resources Code, to read:

5093.69. (a) The Resources Agency shall conduct studies specifically funded by the Legislature relative to the condition of the system and may make recommendations to the Legislature for protection and enhancement of the system.

(b) The director shall conduct studies specifically funded by the Legislature and shall make recommendations relating to all of the following:

(1) The restoration of salmon and steelhead habitat in the system, including measures that can be taken to increase spawning populations, and provide at least 100 miles of reopened spawning and nursery areas each year until the year 1990.

(2) Enforcement requirements necessary to protect the system from fish or wildlife degradation.

(3) Development of information or statistical data necessary to provide the most beneficial management of the fisheries included within the system.

(4) Legislative action deemed necessary to protect the fishery and wildlife values of the system.

SEC. 19. In enacting the provisions of this act, the Legislature intends to expedite and improve the efficient administration and enforcement of the provisions of the California Wild and Scenic Rivers Act while reserving its existing control and supervision of how these rivers are to be managed and not to affect in any way (1) litigation involving the action of the Secretary of the Interior on January 19, 1981, approving designation of certain California rivers as components of the National Wild and Scenic Rivers System, nor (2) any reconsideration by the Secretary of the Interior of the Governor's application for designation by letter dated July 18, 1980.

SEC. 20. No appropriation is made and no reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution or Section 2231 or 2234 of the Revenue and Taxation Code because the only costs which may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, changes the definition of a crime or infraction, changes the penalty for a crime or infraction, or eliminates a crime or infraction.

Appendix N

40 C.F.R.,

§ 1502.14 Alternatives including the proposed action.

This section is the heart of the environmental impact statement. Based on the information and analysis presented in the sections on the Affected Environment (§ 1502.15) and the Environmental Consequences (§ 1502.16), it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public. In this section agencies shall:

(a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.

(b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.

(c) Include reasonable alternatives not within the jurisdiction of the lead agency.

(d) Include the alternative of no action.

(e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.

(f) Include appropriate mitigation measures not already included in the proposed action or alternatives.

§ 1502.16 Environmental consequences.

This section forms the scientific and analytic basis for the comparisons under § 1502.14. It shall consolidate the discussions of those elements required by secs. 102(2)(C)

(i), (ii), (iv), and (v) of NEPA which are within the scope of the statement and as much of sec. 102(2)(C)(iii) as is necessary to support the comparisons. The discussion will include the environmental impacts of the alternatives including the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, the relationship between short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible or irretrievable commitments of resources which would be involved in the proposal should it be implemented. This section should not duplicate discussions in § 1502.14. It shall include discussions of:

(a) Direct effects and their significance (§ 1508.8).

(b) Indirect effects and their significance (§ 1508.8).

(c) Possible conflicts between the proposed action and the objectives of Federal, regional, State, and local (and in the case of a reservation, Indian tribe) land use plans, policies and controls for the area concerned. (See § 1506.2(d).)

(d) The environmental effects of alternatives including the proposed action. The comparisons under § 1502.14 will be based on this discussion.

(e) Energy requirements and conservation potential of various alternatives and mitigation measures.

(f) Natural or depletable resource requirements and conservation potential of various alternatives and mitigation measures.

(g) Urban quality, historic and cultural resources, and the design of the built environment, including the reuse and conservation potential of various alternatives and mitigation measures.

(h) Means to mitigate adverse environmental impacts (if not fully covered under § 1502.14(f)).

[43 FR 55994, Nov. 29, 1978; 44 FR 873, Jan. 3, 1979]

§ 1502.25 Environmental review and consultation requirements.

(a) To the fullest extent possible, agencies shall prepare draft environmental impact statements concurrently with and integrated with environmental impact analyses and related surveys and studies required by the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.), the National Historic Preservation Act of 1966 (16 U.S.C. 470 et seq.), the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.), and other environmental review laws and executive orders.

(b) The draft environmental impact statement shall list all Federal permits, licenses, and other entitlements which must be obtained in implementing the proposal. If it is uncertain whether a Federal permit, license, or other entitlement is necessary, the draft environmental impact statement shall so indicate.

§ 1503.2 Duty to comment.

Federal agencies with jurisdiction by law or special expertise with respect to any environmental impact involved and agencies which are authorized to develop and enforce environmental standards shall comment on statements within their jurisdiction, expertise, or authority. Agencies shall comment within the time period specified for comment in § 1506.10. A Federal agency may reply that it has no comment. If a cooperating agency is satisfied that its views are adequately reflected in the environmental impact statement, it should reply that it has no comment.

§ 1503.4 Response to comments.

(a) An agency preparing a final environmental impact statement shall assess and consider comments both individually and collectively, and shall respond by one or more of the means listed below, stating its response in the final statement. Possible responses are to:

(1) Modify alternatives including the proposed action.

(2) Develop and evaluate alternatives not previously given serious consideration by the agency.

(3) Supplement, improve, or modify its analyses.

(4) Make factual corrections.

(5) Explain why the comments do not warrant further agency response, citing the sources, authorities, or reasons which support the agency's position and, if appropriate, indicate those circumstances which would trigger agency reappraisal or further response.

(b) All substantive comments received on the draft statement (or summaries thereof where the response has been exceptionally voluminous), should be attached to the final statement whether or not the comment is thought to merit individual discussion by the agency in the text of the statement.

(c) If changes in response to comments are minor and are confined to the responses described in paragraphs (a) (4) and (5) of this section, agencies may write them on errata sheets and attach them to the statement instead of rewriting the draft statement. In such cases only the comments, the responses, and the changes and not the final statement need be circulated (§ 1502.19). The entire document with a new cover sheet shall be filed as the final statement (§ 1506.9).

§ 1506.9 Filing requirements.

Environmental impact statements together with comments and responses shall be filed with the Environmental Protection Agency, attention Office of Federal Activities (A-104), 401 M Street SW., Washington, D.C. 20460. Statements shall be filed with EPA no earlier than they are also transmitted to commenting agencies and made available to the public. EPA shall deliver one copy of each statement

to the Council, which shall satisfy the requirement of availability to the President. EPA may issue guidelines to agencies to implement its responsibilities under this section and § 1506.10 below.

§ 1506.10 Timing of agency action.

(a) The Environmental Protection Agency shall publish a notice in the FEDERAL REGISTER each week of the environmental impact statements filed during the preceding week. The minimum time periods set forth in this section shall be calculated from the date of publication of this notice.

(b) No decision on the proposed action shall be made or recorded under § 1505.2 by a Federal agency until the later of the following dates:

(1) Ninety (90) days after publication of the notice described above in paragraph (a) of this section for a draft environmental impact statement.

(2) Thirty (30) days after publication of the notice described above in paragraph (a) of this section for a final environmental impact statement.

An exception to the rules on timing may be made in the case of an agency decision which is subject to a formal internal appeal. Some agencies have a formally established appeal process which allows other agencies or the public to take appeals on a decision and make their views known, after publication of the final environmental impact statement. In such cases, where a real opportunity exists to alter the decision, the decision may be made and recorded at the same time the environmental impact statement is published. This means that the period for appeal of the decision and the 30-day period prescribed in paragraph (b)(2) of this section may run concurrently. In such cases the environmental impact statement shall explain the timing and the public's right of appeal. An agency engaged in rulemaking under the Administrative Procedure Act

or other statute for the purpose of protecting the public health or safety, may waive the time period in paragraph (b)(2) of this section and publish a decision on the final rule simultaneously with publication of the notice of the availability of the final environmental impact statement as described in paragraph (a) of this section.

(c) If the final environmental impact statement is filed within ninety (90) days after a draft environmental impact statement is filed with the Environmental Protection Agency, the minimum thirty (30) day period and the minimum ninety (90) day period may run concurrently. However, subject to paragraph (d) of this section agencies shall allow not less than 45 days for comments on draft statements.

(d) The lead agency may extend prescribed periods. The Environmental Protection Agency may upon a showing by the lead agency of compelling reasons of national policy reduce the prescribed periods and may upon a showing by any other Federal agency of compelling reasons of national policy also extend prescribed periods, but only after consultation with the lead agency. (Also see § 1507.3(d).) Failure to file timely comments shall not be a sufficient reason for extending a period. If the lead agency does not concur with the extension of time, EPA may not extend it for more than 30 days. When the Environmental Protection Agency reduces or extends any period of time it shall notify the Council.

[43 FR 56000, Nov. 29, 1978; 44 FR 874, Jan. 3, 1979]

Appendix O

Federal Register
Vol. 45, No. 80

Wednesday, April 23, 1980

Notices

Office of the Secretary
[516 DM 1-6]

National Environmental Policy Act; Revised Implementing Procedures

AGENCY: Department of the Interior.

ACTION: Notice of final revised procedures.

SUMMARY: This notice announces revised Departmental policies and procedures for compliance with the National Environmental Policy Act of 1969, as amended (NEPA), Executive Order 11514, as amended, and the Council on Environmental Quality's (CEQ) regulations. These procedures are published as Part 516 of the Departmental Manual. They adopt the CEQ regulations, provide supplementary instructions, and reflect the Secretary's decisions concerning the issuance of NEPA procedures, the delegation of the preparation of environmental impact statements (EIS), and the role of the Assistant Secretary —Policy, Budget and Administration.

DATE: The procedures were adopted March 18, 1980.

FOR FURTHER INFORMATION CONTACT: Bruce Blanchard, Director, Office of Environmental Project Review, Office of the Secretary, Department of the Interior, Washington, D.C. 20240. Telephone: (202) 343-3891, FTS 343-3891

SUPPLEMENTARY INFORMATION: This Part provides policy and procedural directions to all elements of the Department for complying with the mandate of NEPA and

the CEQ regulations. Instructions specific to bureaus will be issued as appendices to these procedures. Bureaus will not promulgate separate directives but will, however, prepare handbooks or other technical guidance on how to apply this Part to principal programs.

In addition, the procedures reflect the Secretary's decision to delegate the approval of EISs to program Assistant Secretaries (with further delegation to bureaus allowed) in those cases where the responsibility for the decision for which the EIS has been prepared rests with the Assistant Secretary or below. The authority for approval of an EIS where the decision will occur above an individual program Assistant Secretary is assigned to the Assistant Secretary —Policy, Budget and Administration.

They also set forth the role of the Assistant Secretary —Policy, Budget and Administration and delegate certain functions to the Director, Office of Environmental Project Review, with regard to NEPA matters.

Response to Comments: Proposed procedures were published in the Federal Register on July 10, 1979 (44 FR 40436).

Comments were received from one environmental organization, two industries, and two Federal agencies. As a result of external and internal input, several technical changes were made to improve the procedures. The following is the response to the substantive comments:

1. *Procedures are too broad and more specific guidance is needed.* Two commentors believe that the procedures were too broad and that more specific guidance should be provided in such areas as categorical exclusions, scoping, and public participation. It is the intent of these procedures to provide broad Department-wide procedures adopting and implementing the CEQ regulations. More specific guidance implementing Sec. 1507.3(b)(2) will appear in the bureau appendices. Guidance relating such things as scop-

ing and public participation in bureau planning and decisionmaking processes will appear in bureau handbooks. These will be made available for public review and notices of their availability will be published in the Federal Register.

2. *Categorical exclusions.* Two commentors felt that the categorical exclusions and exceptions to these exclusions were too restrictive and that this would lead to an excessive number of environmental assessments (EA), while another commentor indicated that they were too broad and would allow too many actions to be excluded from the NEPA process. For the past several years, the Department has prepared about 15,000 EAs annually of which less than 10 per year have led to the preparation of EISs.

The Department has carefully constructed the categorical exclusion/exception process to exclude those categories having large numbers of actions with a history of no or little impact, but to include (except from exclusion) those specific actions which may reasonably be expected to have significant impacts. This is expected to reduce substantially the number of unnecessary EAs while insuring that an EA is prepared in all cases where there is any question about the need for an EIS. In addition, the procedures allow EAs to be prepared whenever they assist in planning and decisionmaking.

3. *Joint lead agency designations.* One commentor expressed concern that the Department's procedures do not permit designation of State agencies as joint lead agencies in the preparation of an EIS if they do not have a responsibility to comply with a State statute similar to NEPA. This provision has been included, because lead agencies must agree on the contents of a joint EIS. There can only be a joint EIS where the non-Federal agency has compliance responsibilities similar to NEPA. State agencies with-

out such compliance responsibilities may be cooperating agencies.

4. *Timing of EISs.* One commentor questioned the provision that EISs need not be initiated until applications were essentially complete in light of the requirement in the CEQ regulations that EISs be commenced no later than immediately after the application is received. The Department consulted with CEQ on this matter and is mindful of the intent of the CEQ regulations to encourage EIS preparation to begin early. Thus, the Department's procedures emphasize early initiation of the NEPA process, including consultation and cooperation with the applicant, the public, and other agencies in preliminary studies and analyses of the proposal, its alternatives, and their environmental effects (1.4C, 1.5A, 2.2). In addition, the procedures permit commencement of preparation of the EIS itself prior to completion of an application and this is encouraged where it will expedite the NEPA process and is consistent with the Department's permitting requirements. Nevertheless, the Department is not required to expend funds for preparation of EISs where an application is tentative, substantially incomplete, or where completion is unreasonably delayed.

5. *Supplemental EIS.* Three commentors raised questions about the preparation and processing of supplemental EISs. The CEQ regulations provide the basic requirements in this regard and the Department's procedures are merely supplementary. Minor clarifying changes have been made.

6. *Summaries of EISs.* One commentor believed that the Department should emphasize the summary; expand it to include a description and environmental ranking of the proposal and its alternatives; and bind it separately so that it may be included as the environmental section in Departmental decision documents. Although the Depart-

ment has reservations about environmental rankings in many cases, because of incomparable values, the suggestion has some merit and will be considered on a case-by-case basis for especially large or complex proposals.

7. *Alternatives.* Two commentors recommended that the Department specify the environmentally preferable alternative(s) in the EIS. The Department considers this a part of the decision process and, consistent with the CEQ regulations, will not so specify in the EIS but will do so in the Record of Decision. Two other commentors questioned whether the procedures allowed a bureau's preferred alternative to be the same as an applicant's proposed action. It is the intent of these procedures to require bureaus, after analyzing the reasonable alternatives associated with an applicant's proposal, to identify their preferred alternative in the EIS. This alternative may be the applicant's proposal in many cases.

8. *Other environmental review and consultation requirements.* One commentor requested the Department to include detailed procedures for integrating the environmental review and consultation requirements of the National Historic Preservation Act with NEPA. The Department's NEPA procedures supplement the CEQ regulations and instruct Departmental components to integrate the NHPA procedures to the fullest extent possible. These procedures provide that the draft EIS should be prepared concurrently and integrated with other environmental review requirements. But, because the Department's planning and decision making procedures vary widely among programs, the integration of NEPA and NHPA procedures for specific programs will not be detailed here but will be identified in the bureau handbooks.

9. *Delegation of approval of EISs.* One commentor expressed concern about the Secretary's decision to delegate approval of certain EISs to lower levels of the

Department and felt that the procedures should require that the relationship between the Office of Environmental Project Review and the bureaus be further detailed to ensure the adequacy of environmental documents. The Secretary carefully reviewed this situation before making this decision and, as a part of his decision, these procedures specifically require the Assistant Secretary—Policy, Budget and Administration to make certain that adequate safeguards are instituted.

Format. This Part of the Department Manual (516 DM) is organized as follows:

Chapter 1 (516 DM 1) Protection and Enhancement of Environmental Quality.

1.1 Purpose
1.2 Policy
1.3 General Responsibilities
1.4 Consideration of Environmental Values
1.5 Consultation, Coordination, and Cooperation with Other Agencies and Organizations
1.6 Public Involvement
1.7 Mandate *Chapter 2 (516 DM 2) Initiating the NEPA Process*
2.1 Purpose
2.2 Apply NEPA Early [1501.2]
2.3 Whether to Prepare an EIS [1501.4]
2.4 Lead Agencies [1501.5]
2.5 Cooperating Agencies [1501.6]
2.6 Scoping [1501.7]
2.7 Time Limits [1501.8]
Appendix 1. Departmental Categorical Exclusions

Chapter 3 (516 DM 3) Environmental Assessments

3.1 Purpose
3.2 When to Prepare [1501.3]
3.3 Public Involvement
3.4 Content

3.5 Format Chapter 4 (516 DM 4)
Environmental Impact Statements
4.1 Purpose
4.2 Statutory Requirements [1502.3]
4.3 Timing [1502.5]
4.4 Page Limits [1502.7]
4.5 Supplemental Statements [1502.9]
4.6 Format [1502.10]
4.7 Cover Sheet [1502.11]
4.8 Summary [1502.12]
4.9 Purpose and Need [1502.13]
4.10 Alternatives Including the Proposed Action [1502.14]
4.11 Appendix [1502.18]
4.12 Incorporation by Reference [1502.21]
4.13 Incomplete or Unavailable Information [1502.22]
4.14 Methodology and Scientific Accuracy [1502.24]
4.15 Environmental Review and Consultation Requirements [1502.25]
4.16 Inviting Comments [1503.1]
4.17 Response to Comments [1503.4]
4.18 Elimination of Duplication with State and Local Procedures [1506.2]
4.19 Combining Documents [1506.4]
4.20 Departmental Responsibility [1506.5]
4.21 Public Involvement [1506.6]
4.22 Further Guidance [1506.7]
4.23 Proposals for Legislation [1506.8]
4.24 Time Periods [1506.10]
Appendix 1. List of Other Environmental Review and Consultation Requirements
Appendix 2. Program of Grants to States in which State Agencies having Statewide Jurisdictions May Prepare EISs

Chapter 5 (516 DM 5) Relationship to Decisionmaking

5.1 Purpose
5.2 Predecision Referrals to CEQ [1504.3]
5.3 Decisionmaking Procedures [1505.1]
5.4 Record of Decision [1505.2]
5.5 Implementing the Decision [1505.3]
5.6 Limitations on Actions [1506.1]
5.7 Timing of Actions [1506.10]
5.8 Emergencies [1506.11]

Chapter 6 (516 DM 6) Managing the NEPA Process

6.1 Purpose
6.2 Organization for Environmental Quality
6.3 Approval of EISs
6.4 List of Specific Compliance Responsibilities
6.5 Bureau Requirements
6.6 Information about the NEPA Process
Appendix 1 Fish and Wildlife Service (reserved)
Appendix 2 Geological Survey (reserved)
Appendix 3 Heritage Conservation and Recreation Service (reserved)
Appendix 4 Bureau of Indian Affairs (reserved)
Appendix 5 Bureau of Land Management (reserved)
Appendix 6 Bureau of Mines (reserved)
Appendix 7 National Park Service (reserved)
Appendix 8 Office of Surface Mining (reserved)
Appendix 9 Water and Power Resources Service (reserved)

Chapter 7 (516 DM 7) Review of Other Agencies' Proposals (interim)

(The existing Chapter 3 is being revised and, in the interim, is redesignated as Chapter 7. It is not republished here.)

Chapter 8 (516 DM 8) Environmental Effects Abroad (reserved)

[Citations in brackets refer to the CEQ regulations.]

Proposed appendices to Chapter 6 for bureaus have been published in the Federal Register as follows:

Fish and Wildlife Service (44 FR 65822) November 15, 1979

Heritage Conservation and Recreation Service (44 FR 49523) August 23, 1979

Bureau of Mines (45 FR 10043) February 14, 1980

Office of Surface Mining (45 FR 10043) February 14, 1980

Water and Power Resources Service (44 FR 47627) August 14, 1979

Other bureau appendices to Chapter 6, revised Chapter 7, and Chapter 8 will be published in the Federal Register for review and comment at later dates.

For further information about these procedures or other information about the Department's NEPA process, please contact: Mr. Bruce Blanchard, Director, Office of Environmental Project Review, Office of the Secretary, Department of the Interior, Washington, D.C. 20240, Telephone (202) 343-3891, FTS 343-3891.

Dated: April 18, 1980.

Heather L. Ross,

Deputy Assistant Secretary of the Interior.

Department of the Interior—Departmental Manual

Part 516—National Environmental Policy Act of 1969

Chapter 1—Protection and Enhancement of Environmental Quality; 516 DM 1.1

1.1 *Purpose.* This Chapter establishes the Department's policies for complying with Title 1 of the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321-4347) (NEPA); Section 2 of Executive Order 11514, Protection and Enhancement of Environmental Quality, as amended by Executive Order 11991; and the regulations of the Council on Environmental Quality (CEQ) implement-

ing the procedural provisions of NEPA (40 CFR 1500-1508).

1.2 *Policy.* It is the policy of the Department:

A. To provide leadership in protecting and enhancing those aspects of the quality of the Nation's environment which relate to or may be affected by the Department's policies, goals, programs, plans, or functions in furtherance of national environmental policy;

B. To use all practicable means, consistent with other essential considerations of national policy, to improve, coordinate, and direct its policies, plans, functions, programs, and resources in furtherance of national environmental goals;

C. To interpret and administer, to the fullest extent possible, the policies, regulations, and public laws of the United States administered by the Department in accordance with the policies of NEPA;

D. To consider and give important weight to environmental factors, along with other essential considerations, in developing proposals and making decisions in order to achieve a proper balance between the development and utilization of natural, cultural, and human resources and the protection and enhancement of environmental quality;

E. To consult, coordinate, and cooperate with other Federal agencies and State, local, and Indian tribal governments in the development and implementation of the Department's plans and programs affecting environmental quality and, in turn, to provide to the fullest extent practicable, these entities with information concerning the environmental impacts of their own plans and programs;

F. To provide, to the fullest extent practicable, timely information to the public to better assist in understanding Departmental plans and programs affecting environmental quality and to facilitate their involvement in the development of such plans and programs; and

G. To cooperate with and assist the CEQ.

1.3 *General Responsibilities.* The following responsibilities reflect the Secretary's decision that the officials responsible for making program decisions are also responsible for taking the requirements of NEPA into account in those decisions and will be held accountable for that responsibility:

A. *Assistant Secretary—Policy, Budget and Administration.* (1) Is the Department's focal point on NEPA matters and is responsible for overseeing the Department's implementation of NEPA.

(2) Serves as the Department's principal contact with the CEQ.

(3) Assigns to the Director, Office of Environmental Project Review, the responsibilities outlined for that Office in this Part.

B. *Solicitor.* Is responsible for providing legal advice in the Department's compliance with NEPA.

C. *Assistant Secretaries.* (1) Are responsible for compliance with NEPA, E.O. 11514, as amended, the CEQ regulations, and this Part for bureaus and offices under this jurisdiction.

(2) Will insure that, to the fullest extent possible, the policies, regulations, and public laws of the United States administered under their jurisdiction are interpreted and administered in accordance with the policies of NEPA.

D. *Heads of Bureaus and Office.* (1) Must comply with the provisions of NEPA, E.O. 11514, as amended, the CEQ regulations and this Part.

(2) Will interpret and administer, to the fullest extent possible, the policies, regulations, and public laws of the United States administered under their jurisdiction in accordance with the policies of NEPA.

(3) Will continue to review their statutory authorities, administrative regulations, policies, programs, and procedures, including those related to loans, grants, contracts,

leases, licenses, or permits, in order to identify any deficiencies or inconsistencies therein which prohibit or limit full compliance with the intent, purpose, and provisions of NEPA and, in consultation with the Solicitor and the Legislative Counsel, shall take or recommend, as appropriate, corrective actions as may be necessary to bring these authorities and policies into conformance with the intent, purpose, and procedures of NEPA.

(4) Will monitor, evaluate, and control on a continuing basis their activities so as to protect and enhance the quality of the environment. Such activities will include those directed to controlling pollution and enhancing the environment and designed to accomplish other program objectives which may affect the quality of the environment. They will develop programs and measures to protect and enhance environmental quality and assess progress in meeting the specific objectives of such activities as they affect the quality of the environment.

1.4 *Consideration of Environmental Values.*

A. *In Department Management.* (1) In the management of the natural, cultural, and human resources under its jurisdiction, the Department must consider and balance a wide range of economic, environmental, and social objectives at the local, regional, national, and international levels, not all of which are quantifiable in comparable terms. In considering and balancing these objectives, Departmental plans, proposals, and decisions often require recognition of complements and resolution of conflicts among interrelated uses of these natural, cultural, and human resources within technological, budgetary, and legal constraints.

(2) Departmental project reports, program proposals, issue papers, and other decision documents must carefully analyze the various objectives, resources, and constraints, and comprehensively and objectively evaluate the advantages and disadvantages of the proposed actions and their

reasonable alternatives. Where appropriate, these documents will utilize and reference supporting and underlying economic, environmental, and other analyses.

(3) The underlying environmental analyses will factually, objectively, and comprehensively analyze the environmental effects of proposed actions and their reasonable alternatives. They will systematically analyze the environmental impacts of alternatives, and particularly those alternatives and measures which would reduce, mitigate or prevent adverse environmental impacts or which would enhance environmental quality. However, such an environmental analysis is not, in and of itself, a program proposal or the decision document, is not a justification of a proposal, and will not support or deprecate the overall merits of a proposal or its various alternatives.

B. *In Internally Initiated Proposals.* Officials responsible for development or conduct of planning and decision-making systems within the Department shall incorporate to the maximum extent necessary environmental planning as an integral part of these systems in order to insure that environmental values and impacts are fully considered and in order to facilitate any necessary documentation of those considerations.

C. *In Externally Initiated Proposals.* Officials responsible for development or conduct of loan, grant, contract, lease, license, permit, or other externally initiated activities shall require applicants, to the extent necessary and practicable, to provide environmental information, analyses, and reports as an integral part of their applications. This will serve to encourage applicants to incorporate environmental considerations into their planning processes as well as provide the Department with necessary information to meet its own environmental responsibilities.

1.5 *Consultation, Coordination, and Cooperation with Other Agencies and Organizations.*

A. *Departmental Plans and Programs.* (1) Officials responsible for planning or implementing Departmental plans and programs will develop and utilize procedures to consult, coordinate, and cooperate with relevant State, local, and Indian tribal governments; other bureaus and Federal agencies; and public and private organizations and individuals concerning the environmental effects of these plans and programs on their jurisdiction or interests.

(2) Bureaus and offices will utilize, to the maximum extent possible, existing notification, coordination and review mechanisms established by the Office of Management and Budget, the Water Resources Council, and CEQ. However, use of these mechanisms must not be a substitute for early and positive consultation, coordination, and cooperation with others, especially State, local, and Indian tribal governments.

B. *Other Departmental Activities.* (1) Technical assistance, advice, data, and information useful in restoring, maintaining, and enhancing the quality of the environment will be made available to other Federal agencies, State, local, and Indian tribal governments, institutions, and individuals as appropriate.

(2) Information regarding existing or potential environmental problems and control methods developed as a part of research, development, demonstration, test, or evaluation activities will be made available to other Federal agencies, State, local, and Indian tribal governments, institutions and other entities as appropriate.

(3) Recognizing the worldwide and long-range character of environmental problems, where consistent with the foreign policy of the United States, appropriate support will be made available to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of the world environment.

C. *Plans and Programs of Other Agencies and Organizations.* (1) Officials responsible for protecting, conserving, developing, or managing resources under the Department's jurisdiction shall coordinate and cooperate with State, local, and Indian tribal governments, other bureaus and Federal agencies, and public and private organizations and individuals, and provide them with timely information concerning the environmental effects of these entities' plans and programs.

(2) Bureaus and offices are encouraged to participate early in the planning processes of other agencies and organizations in order to insure full cooperation with and understanding of the Department's programs and interests in natural, cultural, and human resources.

(3) Bureaus and offices will utilize to the fullest extent possible, existing Departmental review mechanisms to avoid unnecessary duplication of effort and to avoid confusion by other organizations.

1.6 *Public Involvement.* Bureaus and offices, in consultation with the Office of Public Affairs, will develop and utilize procedures to insure the fullest practicable provision of timely public information and understanding of their plans and programs with environmental impact including information on the environmental impacts of alternative courses of action. These procedures will include, wherever appropriate, provision for public meetings or hearings in order to obtain the views of interested parties. Bureaus and offices will also encourage State and local agencies and Indian tribal governments to adopt similar procedures for informing the public concerning their activities affecting the quality of the environment. (See also 301 DM 2.)

1.7 *Mandate.* A. This Part provides Department-wide instructions for complying with NEPA and Executive Orders 11514, as amended by 11991 (Protection and

Enhancement of Environmental Quality) and 12114 (Environmental Effects Abroad of Major Federal Actions).

B. The Department hereby adopts the regulations of the CEQ implementing the procedural provisions of NEPA (Sec. 102(2)(C)) except where compliance would be inconsistent with other statutory requirements. In the case of any apparent discrepancies between these procedures and the mandatory provisions of the CEQ regulations, the regulations shall govern.

C. Instructions supplementing the CEQ regulations are provided in Chapters 2-7 of this Part. Citations in brackets refer to the CEQ regulations. Instructions specific to each bureau are appended to Chapter 6. In addition, bureaus may prepare a handbook(s) or other technical guidance for their personnnel on how to apply this Part to principal programs.

D. Instructions implementing Executive Order 12114 will be provided in Chapter 8.

Chapter 2—Initiating the NEPA Process 516 DM 2.1

2.1 *Purpose.* This Chapter provides supplementary instructions for implementing those portions of the CEQ regulations pertaining to initiating the NEPA process.

2.2 *Apply NEPA Early* [1501.2].

A. Bureaus will initiate early consultation and coordination with other bureaus and any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved, and with appropriate Federal, State, local and Indian tribal agencies authorized to develop and enforce environmental standards.

B. Bureaus will also consult early with interested private parties and organizations, including when the bureau's own involvement is reasonably foreseeable in a private or non-Federal application.

C. Bureaus will revise or amend program regulations or directives to insure that private or non-Federal applicants are informed of any environmental information required to be included in their applications and of any consultation with other Federal agencies, and State, local, or Indian tribal governments required prior to making the application. A list of these regulations or directives will be included in each Bureau Appendix to Chapter 6.

2.3 *Whether to Prepare an EIS* [1501.4].

A. *Categorical Exclusions* [1508.4].

(1) The following criteria will be used to determine actions to be categorically excluded from the NEPA process:

(a) The action or group of actions would have no significant effect on the quality of the human environment, and

(b) The action or group of actions would not involve unresolved conflicts concerning alternative uses of available resources.

(2) Based on the above criteria, the classes of actions listed in Appendix 1 to this Chapter are categorically excluded, Department-wide, from the NEPA process. A list of categorical exclusions specific to bureau programs will be included in each Bureau Appendix to Chapter 6.

(3) The following exceptions apply to individual actions within categorical exclusions. Environmental assessments must be prepared for actions which may:

(a) Have significant adverse effects on public health or safety.

(b) Adversely affect such unique geographic characteristics as historic or cultural resources, park, recreation, or refuge lands, wilderness areas, wild or scenic rivers, sole or principal drinking water aquifers, prime farmlands, wetlands, floodplains, or ecologically significant or critical areas, including those listed on the Department's National Register of Natural Landmarks.

(c) Have highly controversial environmental effects.

(d) Have highly uncertain environmental effects or involve unique or unknown environmental risks.

(e) Establish a precedent for future action or represent a decision in principle about a future consideration with significant environmental effects.

(f) Be related to other actions with individually insignificant but cumulatively significant environmental effects.

(g) Adversely affect properties listed or eligible for listing in the National Register of Historic Places.

(h) Affect a species listed or proposed to be listed on the List of Endangered or Threatened Species.

(i) Threaten to violate a Federal, State, local, or tribal law or requirements imposed for the protection of the environment or which require compliance with Executive Order 11988 (Floodplain Management), Executive Order 11990 (Protection of Wetlands), or the Fish and Wildlife Coordination Act.

(4) Notwithstanding the criteria and exceptions above, extraordinary circumstances may dictate or a responsible Departmental or bureau official may decide to prepare environmental assessments.

B. *Environmental Assessment (EA)* [1508.9]. See 516 DM 3.

C. *Finding of No significant Impact (FONSI)* [1508.13]. A FONSI will be prepared as a separate covering document based upon a review of an EA. Accordingly, the words *include(d)* in Section 1508.13 should be interpreted as *attach(ed)*.

D. *Notice of Intent (NOI)* [1508.22]. A NOI will be prepared as soon as practicable after a decision to prepare an environmental impact statement and shall be published in the *Federal Register*, with a copy to the Office of Environmental Project Review, and made available to the affected public in accordance with Section 1506.6. Publication of a

NOI may be delayed if there is proposed to be more than three (3) months between the decision to prepare an environmental impact statement and the time preparation is actually initiated. The Office of Environmental Project Review will periodically publish a consolidated list of these notices in the Federal Register.

E. *Environmental Impact Statement (EIS)* [1508.11]. See 516 DM 4. Decisions/actions which would normally require the preparation of an EIS will be identified in the Bureau Appendix to Chapter 6.

2.4 *Lead Agencies* [1501.5].

A. The Assistant Secretary—Policy, Budget and Administration will designate lead bureaus within the Department when bureaus under more than one Assistant Secretary are involved and will represent the Department in consultations with CEQ or other Federal agencies in the resolution of lead agency determinations.

B. Bureaus will inform the Office of Environmental Project Review of any agreements to assume lead agency status.

C. A non-Federal agency will not be designated as a joint lead agency unless it has a duty to comply with a local or State environmental impact statement requirement that is comparable to a NEPA statement. Any non-Federal agency may be a cooperating agency by agreement. Bureaus will consult with the Solicitor's Office in cases where such non-Federal agencies are also applicants before the Department to determine relative lead/cooperating agency responsibilities.

2.5 *Cooperating Agencies* [1501.6].

A. The Office of Environmental Project Review will assist bureaus and coordinate requests from non-Interior agencies in determining cooperating agencies.

B. Bureaus will inform the Office of Environmental Project Review of any agreements to assume cooperating

agency status or any declinations pursuant to Section 1501.6 (c).

2.6 *Scoping* [1501.7].

A. The invitation requirement in Section 1501.7(a)(1) may be satisfied by including such an invitation in the NOI.

B. If a scoping meeting is held, consensus is desirable; however, the lead agency is ultimately responsible for the scope of an EIS.

2.7 *Time Limits* [1501.8]. When time limits are established they should reflect the availability of personnel and funds.

[516 DM 2]

Appendix 1—Departmental Categorical Exclusions

The following actions are categorical exclusions pursuant to 516 DM 2.3A(2). However, environmental documents will be prepared for individual actions within these categorical exclusions if the exceptions listed in 516 DM 2.3A(3) apply.

1.1 Personnel actions and investigations and personnel services contracts.

1.2 Internal organizational changes and facility and office reductions and closings.

1.3 Routine financial transactions, including such things as salaries and expenses, procurement contracts, guarantees, financial assistance, income transfers, and audits.

1.4 Law enforcement and legal transactions, including such things as arrests; investigations; patents; claims; legal opinions; and judicial proceedings including their initiation, processing and/or settlement.

1.5 Regulatory and enforcement actions, including inspections, assessments, administrative hearings, and decisions; when the regulations themselves or the instruments of regulations (leases, permits, licenses, etc.) have previously been covered by the NEPA process or are exempt from it.

1.6 Non-destructive data collection, inventory (including mapping), study, research and monitoring activities.

1.7 Routine and continuing government business, including such things as supervision, administration, operations, maintenance, and replacement.

1.8 Management, formulation, and allocation of the Department's budget at all levels. (This does not exempt the preparation of environmental documents for proposals included in the budget when otherwise required.)

Chapter 3—Environmental Assessments; 516 DM 3.1

3.1 *Purpose.* This Chapter provides supplementary instructions for implementing those portions of the CEQ regulations pertaining to environmental assessments (EA).

3.2 *When to Prepare* [1501.3].

A. An EA will be prepared for all actions, except those covered by a categorical exclusion, covered sufficiently by an earlier environmental document, or for those actions for which a decision has already been made to prepare an EIS. The purpose of such an EA is to allow the responsible official to determine whether to prepare an EIS.

B. In addition, an EA may be prepared on any action at any time in order to assist in planning and decisionmaking.

3.3 *Public Involvement.*

A. Public notification must be provided and, where appropriate, the public involved in the EA process [1506.6].

B. The scoping process may be applied to an EA [1501.7].

3.4 *Content.*

A. At a minimum, an EA will include brief discussions of the need for the proposal, of alternatives as required by Section 102(2)(E) of NEPA, of the environmental impacts of the proposed action and such alternatives, and a listing of agencies and persons consulted [1508.9(b)].

B. In addition, an EA may be expanded to describe the proposal, a broader range of alternatives, and proposed mitigation measures if this facilitates planning and decisionmaking.

C. The level of detail and depth of impact analysis should normally be limited to that needed to determine whether there are significant environmental effects.

D. An EA will contain objective analyses which support its environmental impact conclusions. It will not, in and of itself, conclude whether or not an EIS will be prepared. This conclusion will be made upon review of the EA by the responsible official and documented in either a NOI or FONSI.

3.5 *Format.*

A. An EA may be prepared in any format useful to facilitate planning and decisionmaking.

B. An EA may be combined with any other planning or decisionmaking document; however, that portion which analyzes the environmental impacts of the proposal and alternatives will be clearly and separately identified and not spread through or interwoven into other sections of the document.

Chapter 4—Environmental Impact Statements; 516 DM 4.1

4.1 *Purpose.* This Chapter provides supplementary instructions for implementing those portions of the CEQ regulations pertaining to environmental impact statements (EIS).

4.2 *Statutory Requirements* [1502.3]. NEPA requires that an EIS be prepared by the responsible Federal official. This official is normally the lowest-level official who has overall responsibility for formulating, reviewing, or proposing an action or, alternatively, has been delegated the authority or responsibility to develop, approve, or adopt

a proposal or action. Preparation at this level will insure that the NEPA process will be incorporated into the planning process and that the EIS will accompany the proposal through existing review processes.

4.3 *Timing* [1502.5].

A. The feasibility analysis (go/no-go) state, at which time an EIS is to be completed, is to be interpreted as the stage prior to the first point of major commitment to the proposal. For example, this would normally be at the authorization stage for proposals requiring Congressional authorization, the location or corridor stage for transportation, transmission, and communication projects, and the leasing stage for mineral resources proposals.

B. An EIS need not be commenced until an application is essentially complete; e.g., any required environmental information is submitted, any consultation required with other agencies has been conducted, and any required advanced funding is paid by the applicant.

4.4 *Page Limits* [1502.7]. Where the text of an EIS for a complex proposal or group of proposals appears to require more than the normally prescribed limit of 300 pages, bureaus will insure that the length of such statements is no greater than necessary to comply with NEPA, the CEQ regulations, and this Chapter.

4.5 *Supplemental Statements* [1502.9].

A. Supplements are only required if such changes in the proposed action or alternatives, new circumstances, or resultant significant effects are not adequately analyzed in the previously prepared EIS.

B. A bureau and/or the appropriate program Assistant Secretary will consult with the Office of Environmental Project Review and the Office of the Solicitor prior to proposing to CEQ to prepare a final supplement without preparing an intervening draft.

C. If, after a decision has been made based on a final EIS, a described proposal is further defined or modified and if its changed effects are minor or still within the scope subsequent decisions rather than a supplement.

4.6 *Format* [1502.10].

A. Proposed departures from the standard format described in the CEQ regulations and this Chapter must be approved by the Office of Environmental Project Review.

B. The section listing the preparers of the EIS will also include other sources of information, including a bibliography or list of cited references, when appropriate.

C. The section listing the distribution of the EIS will also briefly describe the consultation and public involvement processes utilized in planning the proposal and in preparing the EIS, if this information is not discussed elsewhere in the document.

D. If CEQ's standard format is not used or if the EIS is combined with another planning or decisionmaking document the section which analyzes the environmental consequences of the proposal and its alternatives will be clearly and separately identified and not interwoven into other portions of or spread throughout the document.

4.7 *Cover Sheet* [1502.11]. The cover sheet will also indicate whether the EIS is intended to serve any other environmental review or consultation requirements pursuant to Section 1502.25.

4.8 *Summary* [1502.12]. The emphasis in the summary should be on those considerations, controversies, and issues which significantly affect the quality of the human environment.

4.9 *Purpose and Need* [1502.13]. This section may introduce a number of factors, including economic and technical considerations and Departmental or bureau statutory missions, which may be beyond the scope of the EIS. Care

should be taken to insure an objective presentation and not a justification.

4.10 *Alternatives Including the Proposed Action* [1502.14].

A. As a general rule, the following guidance will apply:

(1) For internally initiated proposals; i.e., for those cases where the Department conducts or controls the planning process, both the draft and final EIS shall identify the bureau's proposed action.

(2) For externally initiated proposals; i.e., for those cases where the Department is reacting to an application or similar request, the draft and final EIS shall identify the applicant's proposed action and the bureau's preferred alternative unless another law prohibits such an expression.

(3) Proposed departures from this guidance must be approved by the Office of Environmental Project Review and the Office of the Solicitor.

B. Mitigation measures are not necessarily independent of the proposed action and its alternatives and should be incorporated into and analyzed as a part of the proposal and appropriate alternatives. Where appropriate, major mitigation measures may be identified and analyzed as separate alternatives in and of themselves where the environmental consequences are distinct and significant enough to warrant separate evaluation.

4.11 *Appendix* [1502.18]. If an EIS is intended to serve other environmental review or consultation requirements pursuant to Section 1502.25, any more detailed information needed to comply with these requirements may be included as an appendix.

4.12 *Incorporation by Reference* [1502.21]. Citations of specific topics will include the pertinent page numbers. All literature references will be listed in the bibliography.

4.13 *Incomplete or Unavailable Information* [1502.22]. The references to overall costs in this section are not lim-

ited to market costs, but include other costs to society such as social costs due to delay.

4.14 *Methodology and Scientific Accuracy* [1502.24]. Conclusions about environmental effects will be preceded by an analysis that supports that conclusion unless explicit reference by footnote is made to other supporting documentation that is readily available to the public.

4.15 *Environmental Review and Consultation Requirements* [1502.25].

A. A list of related environmental review and consultation requirements is attached as Appendix 1 to this Chapter.

B. If the EIS is intended to serve as the vehicle to fully or partially comply with any of these requirements, the associated analyses, studies, or surveys will be identified as such and discussed in the text of the EIS and the cover sheet will so indicate. Any supporting analyses or reports will be referenced or included as an appendix and shall be sent to reviewing agencies as appropriate in accordance with applicable regulations or procedures.

4.16 *Inviting Comments* [1503.1].

A. Comments from State agencies will be requested through the State Clearinghouse established by the Governor pursuant to OMB Circular A-95, unless the Governor has designated an alternative review process, and may be requested from local agencies through Areawide Clearinghouses to the extent that they include the affected local jurisdiction.

B. When the proposed action may affect the environment of an Indian reservation, comments will be requested from the Indian tribe through the tribal governing body, unless the tribal governing body has designated an alternate review process.

4.17 *Response to Comments* [1503.4]

A. Preparation of a final EIS need not be delayed in those cases where a Federal agency, from which comments

are required to be obtained [1503.1(a)(1)], does not comment within the prescribed comment period. Informal attempts will be made to determine the status of any such comments and every reasonable attempt should be made to include the comments and a response in the final EIS.

B. When other commentators are late, their comments should be included in the final EIS to the extent practicable.

C. For those EISs requiring the approval of the Assistant Secretary—Policy, Budget and Administration pursuant to 516 DM 6.3, bureaus will consult with the Office of Environmental Project Review when they propose to prepare an abbreviated final EIS [1503.4(c)].

4.18 *Elimination of Duplication with State and Local Procedures* [1506.2]. Bureaus will incorporate in their appropriate program regulations provisions for the preparation of an EIS by a State agency to the extent authorized in Section 102(3)(D) of NEPA. Eligible programs are listed in Appendix 2 to this Chapter.

4.19 *Combining Documents* [1506.4]. See 516 DM 4.6D.

4.20 *Departmental Responsibility* [1506.5]. Following the responsible official's preparation or independent evaluation of and assumption of responsibility for an environmental document, an applicant may print it provided the applicant is bearing the cost of the document pursuant to other laws.

4.21 *Public Involvement* [1506.6]. See 516 DM 1.6 and 301 DM 2.

4.22 *Further Guidance* [1506.7]. The Office of Environmental Project Review may provide further guidance concerning NEPA pursuant to its organizational responsibilities (110 DM 22) and through supplemental directives (015 DM 6).

4.23 *Proposals for Legislation* [1506.8]. The Legislative Counsel, in consultation with the Office of Environmental Project Review, shall:

A. Identity in the annual submittal to OMB of the Department's proposed legislative program any requirements for and the status of any environmental documents.

B. When required, insure that a legislative EIS is included as a part of the formal transmittal of a legislative proposal to the Congress.

4.24 *Time Periods* [1506.10].

A. The minimum review period for a draft EIS will be sixty (60) days from the date of transmittal to the Environmental Protection Agency.

B. For those EISs requiring the approval of the Assistant Secretary—Policy, Budget and Administration pursuant of 516 DM 6.3, the Office of Environmental Project Review will be responsible for consulting with the Environmental Protection Agency and/or CEQ about any proposed reductions in time periods or any extensions of time periods proposed by those agencies. [516 DM 4].

Appendix 1—List of Other Environmental Review and Consultation Requirements

1.1 *Cultural Resources*

Archeological Resources Protection Act of 1979, 16 U.S.C. 470aa *et seq.*

Archeological and Historic Preservation Act of 1974, 16 U.S.C. 469a-1

National Historic Preservation Act of 1966 (Sec. 106), 16 U.S.C. 470f

Antiquities Act of 1906, 16 U.S.C. 431

Executive Order 11593 (Protection and Enhancement of the Cultural Environment)

American Indian Religious Freedom Act, 92 Stat. 469

1.2 *Water and Related Land Resources*

Marine Protection, Research and Sanctuaries Act of 1972 (Sec. 102, 103, 301), 16 U.S.C. 1431 *et seq.*

Safe Drinking Water Act of 1974, 42 U.S.C. 300f

Flood Disaster Protection Act of 1973, 12 U.S.C. 24, 1701-1 Supp., 42 U.S.C. 4001 *et seq.*

Coastal Zone Management Act of 1972, 16 U.S.C. 1451, 1456

Estuary Protection Act, 16 U.S.C. 1221

Executive Order 11988 (Floodplain Management)

Executive Order 11990 (Wetlands Protection)

Federal Water Project Recreation Act (Ss 6(a)), 16 U.S.C. 4601-17

Clean Water Act (Sec. 208, 303 ,401, 402, 404, 405, 511), 33 U.S.C. 1288, 1314, 1341, 1342, 1344

Rivers and Harbors Act of 1899 (Section 9 and Section 10), 33 U.S.C. 401 *et seq.*

Wild and Scenic Rivers Act of 1968 (Sec. 7), 16 U.S.C. 1274 *et seq.*

Federal Power Act, 16 U.S.C. 797

Water Resources Planning Act of 1965, 42 U.S.C. 1962 *et seq.*

Water Resources Council's Principles and Standards

1.3 *Wildlife*

Endangered Species Act (Sec. 7), 16 U.S.C. 1531 *et seq.*

Fish and Wildlife Coordination Act, 16 U.S.C. 661, 662

Fish and Wildlife Conservation at Small Watershed Projects, 16 U.S.C. 1001, 1005(4), 1008

1.4 *Public Lands, Open Space, Recreation*

Federal Land Policy and Management Act, 43 U.S.C. 1701, 1761-1771

Mineral Leasing Act Amendments of 1973, 30 U.S.C. 185

Forest and Rangeland Renewable Resources Act, 16 U.S.C. 1601 *et seq.*

Land and Water Conservation Fund Act of 1965 (Sec. 6(f)), 16 U.S.C. 4601-8(f)

Open Space Lands, 42 U.S.C. 1500a(d)

Urban Park and Recreation Recovery Act, 16 U.S.C. 2501 *et seq.*

National Trails System Act, 16 U.S.C. 1241

1.5 *Marine Resources*

Deepwater Port Act, 33 U.S.C. 1501, 1503-1505

Ocean Dumping, 33 U.S.C. 1401, 1412, 1413, 1414

Marine Protection, Research and Sanctuaries Act, 16 U.S.C. 1431-1434

1.6 *Transportation*

Department of Transportation Act of 1966 (Sec. 4(f)), 49 U.S.C. 1653(f)

Federal Aid Highway Act of 1958, 23 U.S.C. 128, 138

Urban Mass Transportation Act of 1964, 49 U.S.C. 1602, 1610

Airport and Airway Development Act of 1970, 49 U.S.C. 1716

Federal Aviation Act, 49 U.S.C. 3334

1.7 *Air Quality*

Clean Air Act, 42 U.S.C. 7401 *et seq.*

1.8 *Miscellaneous*

Intergovernmental Coordination Act of 1968 42 U.S.C. 4201, 4231, 4233 (A-95 review process, including urban impact analysis)

Demonstration Cities and Metropolitan Development Act of 1966 42 U.S.C. 3334

Surface Mining Control and Reclamation Act of 1977 30 U.S.C. 1201 *et seq.*

Resources Conservation and Recovery Act of 1976 42 U.S.C. 3251 *et seq.*

Noise Control Act of 1972, as amended 42 U.S.C. 4901 *et seq.*

[516 DM 4]

Appendix 2—Programs of Grants to States in Which State Agencies Having Statewide Jurisdiction May Prepare EISs

2.1 Fish and Wildlife Service

A. Anadromous Fish Conservation [#15.600]

B. Fish Restoration [#15.605]

C. Wildlife Restoration [#15.611]

D. Endangered Species Conservation [#15.612]

2.2 Heritage Conservation and Recreation Service

A. Outdoor Recreation—Acquisition, Development and Planning [#15.400]

B. Historic Preservation Grants-in-Aid [#15.411]

C. Urban Park and Recreation Recovery Program Grants (not yet incorporated in CFDA)

Note.—Citations in brackets refer to the Catalog of Federal Domestic Assistance, Office of Management and Budget, 1979.

Chapter 5—Relationship to Decisionmaking; 516 DM 5.1

5.1 *Purpose.* This Chapter provides supplementary instructions for implementing those portions of the CEQ regulations pertaining to decisionmaking.

5.2 *Predecision Referrals to CEQ* [1504.3].

A. Upon receipt of advice that another Federal agency intends to refer a Departmental matter to CEQ, the lead bureau will immediately meet with that Federal agency to attempt to resolve the issues raised and expeditiously notify its Assistant Secretary and the Office of Environmental Project Review.

B. Upon any referral of a Departmental matter to CEQ by another Federal agency, the Office of Environmental Project Review will be responsible for coordinating the Department's position.

5.3 *Decisionmaking Procedures* [1505.1]

A. Procedures for decisions by the Secretary/Under Secretary are specified in 301 DM 1. Assistant Secretaries should follow a similar process when an environmental document accompanies a proposal for their decision.

B. Bureaus will incorporate in their formal decisionmaking procedures and NEPA handbooks provisions for consideration of environmental factors and relevant environmental documents. The major decision points for principal programs likely to have significant environment effects will be identified in the Bureau Appendix to Chapter 6.

C. Relevant environmental documents, inlcuding [sic] supplements, will be included as part of the record in formal rulemaking or adjudicatory proceedings.

D. Relevant environmental documents, comments, and responses will accompany proposals through existing review processes so that Departmental officials use them in making decisions.

E. The decisionmaker will consider the environmental impacts of the alternatives described in any relevant environmental deocuments [sic] and the range of these alternatives must encompass the alternatives considered by the decisionmaker.

5.4 *Record of Decision* [1505.2].

A. Any decision documents prepared pursuant to 301 DM 1 for proposals involving an EIS may incorporate all appropriate provisions of Section 1505.2(b) and (c).

B. If a decision document incorporating these provisions is made available to the public following a decision, it will serve the purpose of a record of decision.

5.5 *Implementing the Decision* [1505.3]. The terms "monitoring" and "conditions" will be interpreted as being related to factors affecting the quality of the human environment.

5.6 *Limitations on Actions* [1506.1]. A bureau will notify its Assistant Secretary, the Solicitor and the Office of Environmental Project Review of any situation described in Section 1506.1(b).

5.7 *Timing of Actions* [1506.10]. For those EISs requiring the approval of the Assistant Secretary—Policy, Budget and Administration pursuant to 516 DM 6.3, the responsible official will consult with the Office of Environmental Project Review before making any request for reducing the time period before a decision or action.

5.8 *Emergencies* [1506.11]. In the event of an unanticipated emergency situation, a bureau will immediately take any necessary action to prevent or reduce risks to public health or safety or serious resource losses and then expeditiously consult with its Assistant Secretary, the Solicitor, and the Office of Environmental Project Review about compliance with NEPA. The Office of Environmental Project Review and the bureau will jointly be responsible for consulting with CEQ.

Chapter 6—Managing the NEPA Process; 516 DM 6.1

6.1 *Purpose.* This Chapter provides supplementary instructions for implementing those provisions of the CEQ regulations pertaining to procedures for implementing and managing the NEPA process.

6.2 *Organization for Environmental Quality.*

A. *Office of Environmental Project Review.* The Director, Office of Environmental Project Review, reporting to the Assistant Secretary—Policy, Budget and Administration (PBA), is responsible for providing advice and assistance to the Department on matters pertaining to environmental quality and for overseeing and coordinating the Department's compliance with NEPA, E.O. 11514, the CEQ regulations,and this Part. (See also 110 DM 22.)

B. *Bureaus and Offices.* Heads of bureaus and offices will designate organizational elements or individuals, as appropriate, at headquarters and regional levels to be responsible for overseeing matters pertaining to the environmental effects of the bureau's plans and programs. The individuals assigned these responsibilities should have

management experience or potential, understand the bureau's planning and decisionmaking processes, and be well trained in environmental matters, including the Department's policies and procedures so that their advice has significance in the bureau's planning and decisions. These organizational elements will be identified in the Bureau Appendix to this Chapter.

6.3 *Approval of EISs.*

A. A program Assistant Secretary is authorized to approve an EIS in those cases where the responsibility for the decision for which the EIS has been prepared rests with the Assistant Secretary or below. The Assistant Secretary may further assign the authority to approve the EIS if he or she chooses. The Assistant Secretary—PBA will make certain that each program Assistant Secretary has adequate safeguards to assure that the EISs comply with NEPA, the CEQ regulations, and the Departmental Manual.

B. The Assistant Secretary—PBA is authorized to approve an EIS in those cases where the decision for which the EIS has been prepared will occur at a level in the Department above an individual program Assistant Secretary.

6.4 *List of Specific Compliance Responsibilities.*

A. Bureaus and offices shall:

(1) Prepare NEPA handbooks providing guidance on how to implement NEPA in principal program areas.

(2) Prepare program regulations or directives for applicants.

(3) Propose categorical exclusions.

(4) Prepare and approve EAs.

(5) Decide whether to prepare an EIS.

(6) Prepare and publish NOIs and FONSIs.

(7) Prepare and, when assigned, approve EISs.

B. Assistant Secretaries shall:

(1) Approve bureau handbooks.

(2) Approve regulations or directives for applicants.

(3) Approve categorical exclusions.

(4) Approve EISs pursuant to 516 DM 6.3.

C. The Assistant Secretary—Policy, Budget and Administration shall:

(1) Concur with regulations or directives for applicants.

(2) Concur with categorical exclusions.

(3) Approve EISs pursuant to 516 DM 6.3.

6.5 *Bureau Requirements.*

A. Requirements specific to bureaus appear as appendices to this Chapter and include the following:

(1) Identification of officials and organizational elements responsible for NEPA compliance (516 DN 6.2B).

(2) List of program regulations or directives which provide information to applicants (516 DM 2.2B).

(3) Identification of major decision points in principal programs (516 DM 5.3B) for which an EIS is normally prepared (516 DM 2.3E).

(4) List of categorical exclusions (516 DM 2.3A).

B. Appendices are attached for the following bureaus:

(1) Fish and Wildlife Service (Appendix 1).

(2) Geological Survey (Appendix 2).

(3) Heritage Conservation and Recreation Service (Appendix 3).

(4) Bureau of Indian Affairs (Appendix 4).

(5) Bureau of Land Management (Appendix 5).

(6) Bureau of Mines (Appendix 6).

(7) National Park Service (Appendix 7).

(8) Office of Surface Mining (Appendix 8).

(9) Water and Power Resources Services (Appendix 9).

C. The Office of the Secretary and other Departmental Offices do not have separate appendices, but must comply with this Part and will consult with the Office of Environmental Project Review about compliance activities.

6.6 *Information About the NEPA Process.* The Office of Environmental Project Review will publish periodically a Departmental list of contacts where information about the NEPA process and the status of EISs may be obtained.

[FR Doc. 80-12392 Filed 4-22-80; 8:45 am]

BILLING CODE 4310-10-M

Appendix P

In the Superior Court of the State of California
In and For the County of Sacramento

No. 292019 Dept. 20

County of Del Norte, Del Norte Unified School District,
Association of California Water Agencies,
Antelope Valley-East Kern Water Agency,
Castaic Lake Water Agency,
Coachella Valley County Water District,
Crestline-Lake Arrowhead Water Agency,
Desert Water Agency, Kern County Water Agency,
The Metropolitan Water District of Southern California,
Mojave Water Agency, San Bernardino Valley
Municipal Water District, and San Gabriel Valley
Municipal Water District,
Petitioners,

vs.

Edmund G. Brown, Jr., in his capacity as the
Governor of the State of California, the Resources Agency
of the State of California,
Huey D. Johnson, in his capacity as the Secretary of the
Resources Agency of State of California, the Department of
Water Resources of the State of California, and
Ronald B. Robie, in his capacity as Director of the
Department of Water Resources,
Respondents.

[Filed Dec. 5, 1980]

Memorandum Decision

This matter is before the Court pursuant to an Alternative Writ of Mandamus issued on October 20, 1980. The matter was heard on November 7, 1980, Kronick, Moskovitz, Tiedemann & Girard and Edward J. Tiedemann

appearing for petitioners; Ralph E. Helm, Esq. appearing for petitioner San Gabriel Valley Municipal Water District; Victor E. Gleason, Esq. appearing for petitioner The Metropolitan Water District of Southern California; and George Deukmejian, Attorney General, and Denis D. Smaage, Deputy Attorney General, appearing for respondents.

The petitioners seek an order (1) restraining respondents from taking any further action in furtherance of the Governor's July 18, 1980 application to the U. S. Secretary of the Interior for inclusion of designated portions of the Klamath River and its designated tributaries, the Trinity River and its designated tributaries, the Smith River and all of its tributaries, the Eel River and its designated tributaries, and the American River, in the National Wild and Scenic Rivers System; (2) directing the Governor to withdraw the application; (3) directing respondents to refrain from renewing any similar application until after the Legislature has approved management plans for those rivers; (4) directing respondents with respect to the Eel River to refrain from renewing any similar application until after January 1, 1985, the Legislature has determined whether all or any portion of the Eel River should be deleted from the California Wild and Scenic Rivers System; and (5) directing the Resources Secretary to refrain from implementing any management plans, or management concept plans until the Legislature has approved properly promulgated management plans.

On July 18, 1980, the Governor applied to Cecil D. Andrus, Secretary of the Interior, for inclusion of the Klamath, Trinity, Smith, Eel and American Rivers in the National Wild and Scenic Rivers System. On September 10, 1980, the Resources Secretary transmitted to Department of the Interior Heritage Conservation and Recreation Service "A Proposal for California Administration of Rivers" pursuant to a "Cooperative Work Agreement" entered into

on August 20, 1980 between the Resources Agency and the Heritage Conservation and Recreation Service (HCRS).

The Governor's application was made pursuant to 16 U.S.C. § 1273(a). That section requires that rivers sought to be included in the national system must have been designated as wild, scenic or recreational rivers by the state Legislature. Petitioners concede that the five subject rivers have been so designated. The rivers are to be permanently administered as wild, scenic or recreational by a state agency. Petitioners contend that the California Act does not provide for permanent administration absent a legislatively approved management plan for each river. Finally, the Secretary of the Interior must find that the subject rivers meet the criteria for inclusion established by the federal act. (I.e., free-flowing rivers which possess "outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values. . . .") (See 16 U.S.C. § 1271.)

It is undisputed that no management plan for any of the rivers sought to be included has been approved by the Legislature. The respondents contend, however, that the California Wild and Scenic Rivers Act itself is the basis for a finding that the components of the system will be permanently administered by the Resources Agency, and thus the requirement of the federal law is satisfied.

The California Wild and Scenic Rivers Act (hereinafter "the California Act") creates the California Wild and Scenic Rivers System "to be administered in accordance with the provisions of this chapter." (Public Resources Code § 5093.50.)

Under the California Act, the Secretary of the Resources Agency is given certain duties, responsibility and authority. He is to classify rivers in the system as either wild rivers, scenic rivers, or recreational rivers. (Public Resources Code

§ 5093.53.) He is authorized to recommend to the Legislature other rivers which qualify for inclusion in the System. (§ 5093.54(f).) He has veto power over construction on or directly affecting any component river, any diversion facility for domestic water supply. (Public Resources Code § 5093.55.) He is required to develop, in close cooperation with the counties, and to prepare a "management plan to administer the rivers and adjacent land areas," and to submit such management plan to the Legislature for its approval. (§§ 5093.58, 5093.59). The Secretary is also declared to be responsible for administration of the System. (§ 5093.60.)

The issue presented is whether respondents may request, and take steps in furtherance of the application for inclusion under the National Wild and Scenic Rivers System of these five rivers, designated as components of the California Wild and Scenic Rivers System, prior to approval by the Legislature of a management plan to be prepared by the Secretary for Resources.

It appears from the language of the California Act that the Resources Secretary has the authority to administer the System pursuant to a legislatively approved management plan. Until such plan is prepared, submitted to the Legislature and approved by it, the Resources Secretary has limited power with respect to component rivers in the System. If one were to read the California Act otherwise, the result would render the statute unnecessary. For example, by delaying or failing to prepare management plans, the Resources Secretary could administer the System in any fashion he chooses indefinitely without ever requesting or seeking approval of the Legislature. While the Resources Secretary does have some power with respect to components of the System (e.g., the power to veto certain diversion projects; the authority to classify the rivers as wild, as scenic or as recreational; the duty to refrain from cooperating or assisting in the planning or construction of

projects with potential adverse effect), these powers are in the nature of preservation of the rivers in their free-flowing natural condition until plans for the complete management and administration of the System are approved by the Legislature. It is clear that the Legislature did not intend that the Resources Secretary could administer the System in the interim in such fashion as to avoid the duties mandated by the Act.

It further appears that the Legislature did not intend that the Governor could bypass the necessity for legislative approval of management plans by placing the component rivers under a federal program which would place them beyond the management plan approval which the Legislature has reserved to itself.

The conclusion the Court reaches as to statutory construction of California law is that the present state of law and fact in California is such that the Secretary of Resources cannot guarantee to "permanently administer" the five rivers designated by statute. Whether or not Congress intended the same interpretation of the phrase "permanently administer" as the interpretation given by a state Court of a state making application is unknown. However, by way of dictum, this Court notes that an attempt by Congress to confer power upon a governor in excess of that conferred under state law would be constitutionally suspect.

To grant the relief requested by the petitioners would, however, be too large a step. Federal law clearly gives the Governor the right to apply to the U. S. Department of the Interior and to represent, as he has done, that these rivers meet the standard for inclusion of rivers in the National Wild and Scenic Rivers System. No provision of state law prohibits the application. It is the duty of the Department of the Interior to evaluate whether in fact the respondents have satisfied the requirement that designated wild, scenic

or recreational rivers are to be permanently administered by the state. The burden of establishing that threshold requirement is on the respondents with respect to the Department of the Interior.

The petitioners ask this Court to prevent what is clearly an act authorized by federal law, that is, the submission and processing of the Governor's application. The Court believes that to do so would violate the separation of powers doctrine. While the Governor claims that the California Act confers permanent administrative authority over the System to the Resources Secretary, this Court can apply its own interpretation of the Act. Having done so, it is then the province of the Secretary of the Interior to find in accordance with the Court's interpretation of the California Act whether federal requirements for inclusion of these rivers in the national system have been met.

Thus, under any theory pled by petitioners, this Court would not have the power to order the respondents to either withdraw the application or abandon attempts by respondents to convince the Secretary of the Interior that, given this Court's interpretation of the California Act, the requirements of the federal law are nonetheless satisfied.

As to the contention that the Governor may not make application for inclusion of the Eel River because that river is given special status, the above interpretation applies with equal force. The Eel River is currently designated as a component of the California System. The California Act directs the Department of Water Resources upon expiration of 12 years from the effective date of the Act to report to the Legislature concerning the need for water supply and flood control projects on the Eel and its tributaries, and directs the Legislature to hold public hearings to determine whether the river or any segment of it should be deleted from the system. (Public Resources Code § 5093.54(d).) This language does not remove the Eel River from the System. Should the Department of the Interior determine

that federal standards for inclusion be met, it might make inclusion of the Eel subject to the power of the Legislature to remove it from the state System, or conditionally include it until the Legislature has acted.

Finally, the Resources Secretary has alleged in the Return that no management plans or so-called management concept plans will be implemented with respect to the subject rivers without prior approval of the Legislature. The Proposal submitted to HCRS is consistent with this representation in that it specifically provides that all plans deemed by the Resources Secretary to be acceptable under the State and Federal Acts will be submitted to the Legislature for approval. (See page 32 of the Proposal, Appendix E to the Draft EIS dated September, 1980.)

It is the decision of this Court that the Peremptory Writ of Mandamus be denied and the Alternative Writ discharged on the following grounds:

1. While the Secretary of the Resources Agency does have some powers with respect to maintaining the free-flowing natural character of the rivers designated as components of the California Wild and Scenic Rivers System, and the Court finds that he presently has no power to "permanently administer" the system because no management plan for administration has been legislatively approved, the Governor is not prohibited by state statute from making or pursuing his application to the Department of the Interior.

2. The Department of the Interior has the authority under the National Wild and Scenic Rivers Act to determine whether the rivers sought to be included are subject to permanent administration by an agency of the State within the meaning of the Federal Act, but only in light of this Court's interpretation of the California Act set forth herein.

3. The Eel River is now a component of the California Wild and Scenic Rivers System subject to removal from the System by legislative action after January 1, 1985.

It is the further decision of this Court that the prayer for attorney fees pursuant to Code of Civil Procedure § 1021.5 be denied. The Court finds that the provisions of Code of Civil Procedure § 1021.5 do not apply in favor of public entities. The petitioners, each being public entities or an association representing public entities, are not entitled to an award of attorney fees.

Petitioners shall prepare a judgment accordingly.

DATED: December 5, 1980

FRED W. MARLER, JR.
Presiding Judge of the Superior Court

Appendix Q

In the Superior Court of the State of California
In and For the County of Sacramento

No. 292019

County of Del Norte, Del Norte Unified School District, Association of California Water Agencies, Antelope Valley-East Kern Water Agency, Castaic Lake Water Agency, Coachella Valley County Water District, Crestline-Lake Arrowhead Water Agency, Desert Water Agency, Kern County Water Agency, The Metropolitan Water District of Southern California, Mojave Water Agency, San Bernardino Valley Municipal Water District, and San Gabriel Valley Municipal Water District,
Petitioners,

vs.

Edmund G. Brown, Jr., in his capacity as the Governor of the State of California, the Resources Agency of the State of California, Huey D. Johnson, in his capacity as the Secretary of the Resources Agency of State of California, the Department of Water Resources of the State of California, and Ronald B. Robie, in his capacity as Director of the Department of Water Resources,
Respondents.

[Filed April 7, 1981]

Judgment with Findings of Fact and Conclusions of Law

This matter was commenced by Petitioners on October 20, 1980, by the filing of their "Petition for Alternative and Peremptory Writs of Mandamus, Application for Stay Order or Temporary Restraining Order, and Complaint

for Preliminary and Permanent Injunctions and Declaratory Relief." On that date an Alternative Writ of Mandamus was issued and the matter was heard on November 7, 1980. Petitioners appeared through their attorneys, Kronick, Moskovitz, Tiedemann & Girard, a professional corporation, by Edward J. Tiedemann; Thomas S. Owen appearing for petitioners County of Del Norte and Del Norte Unified School District, Ralph E. Helm appearing for petitioner San Gabriel Valley Municipal Water District; and Victor E. Gleason appearing for petitioner The Metropolitan Water District of Southern California. Respondents appeared through their attorney, George Deukmejian, Attorney General of the State of California, by Denis D. Smaage, Deputy Attorney General.

The petitioners sought an order (1) restraining respondents from taking any further action in furtherance of the Governor's July 18, 1980 application to the U. S. Secretary of the Interior for inclusion of designated portions of the Klamath River and its designated tributaries, the Trinity River and its designated tributaries, the Smith River and all of its tributaries, the Eel River and its designated tributaries, and the American River, in the National Wild and Scenic Rivers System; (2) directing the Governor to withdraw the application; (3) directing respondents to refrain from renewing any similar application until after the Legislature has approved management plans for those rivers; (4) directing respondents with respect to the Eel River to refrain from renewing any similar application until after January 1, 1985, the Legislature has determined whether all or any portion of the Eel River should be deleted from the California Wild and Scenic Rivers System; and (5) directing the Resources Secretary to refrain from implementing any management plans, or management concept plans until the Legislature has approved properly promulgated management plans.

The Court, having fully considered the material presented to it and having heretofore rendered its Memoran-

dum Decision, now makes the following Findings of Fact and Conclusions of Law and renders the following judgment:

FINDINGS OF FACT

THE COURT FINDS THAT:

1. On July 18, 1980, respondent Edmund G. Brown, Jr., Governor of the State of California, applied to Cecil D. Andrus, the United States Secretary of the Interior, for inclusion of portions of the Klamath, Trinity, Smith, Eel, and American Rivers, and certain specified tributaries thereof, in the National Wild and Scenic Rivers System (hereinafter "the National System") pursuant to Section 2(a)(ii) of the National Wild and Scenic Rivers Act (16 U.S.C. § 1273, subd. (a), hereinafter "the Federal Act").

2. Section 2(a)(ii) of the Federal Act provides that upon the application of the Governor of a State, the Secretary of the Interior may approve for inclusion in the National System, rivers that are designated as wild, scenic or recreational by an act of the legislature of the State through which they flow, that are to be permanently administered as wild, scenic or recreational rivers by an agency or political subdivision of the State, if the Secretary of the Interior finds that the rivers meet the criteria established by the Federal Act and such supplementary criteria as the Secretary may prescribe.

3. The California Wild and Scenic Rivers Act (hereinafter "the California Act") creates the California Wild and Scenic Rivers System (hereinafter "the California System") to be administered in accordance with the provisions of Chapter 1.4, Division 5 of the Public Resources Code, Sections 5093.50 *et seq.*

4. The five rivers referred to in Finding 1 are components of the California System and have been designated by the California Legislature as wild, scenic or recreational rivers.

5. The Eel River is currently designated as a component of the California System. The California Act directs the Department of Water Resources upon expiration of 12 years from the effective date of the Act to report to the Legislature concerning the need for water supply and flood control projects on the Eel and its tributaries, and directs the Legislature to hold public hearings to determine whether the river or any segment of it should be deleted from the California System (Public Resources Code Section 5093.54(d)). This language does not remove the Eel River from the System.

6. No management plan for any of the five rivers referred to in Finding 1, above, has been approved by the California Legislature.

CONCLUSIONS OF LAW

From the foregoing findings, the Court makes the following conclusions of law:

1. Under the California Act the Resources Secretary has the authority to administer the California System pursuant to a legislatively-approved management plan, but until such a plan is prepared, submitted to the Legislature and approved by it, the Resources Secretary has limited power with respect to component rivers in the California System.

2. While the Secretary of the Resources Agency does have some powers with respect to maintaining the free-flowing natural character of the rivers designated as components of the California System, he presently has no power to "permanently administer" the System, because no management plan for administration has been legislatively approved.

3. The existing powers of the Secretary for Resources are in the nature of preservation of the rivers in their free-flowing natural condition until plans for the complete

management and administration of the System are approved by the Legislature.

4. The present state of law and fact under the California Act is such that the Secretary of Resources cannot guarantee to "permanently administer" the five rivers in the California System.

5. The Legislature did not intend that the Resources Secretary could administer the California System in the interim before the approval of management plans by the Legislature in such a fashion as to avoid the duties mandated by the California Act.

6. The Legislature did not intend that the Governor could bypass the necessity for legislative approval of management plans by placing the component rivers of the California System under a federal program which would place them beyond the management plan approval which the Legislature has reserved to itself.

7. The Department of the Interior has the authority under the Federal Act to determine whether the rivers sought to be included by the Governor's application are subject to permanent administration by an agency of the State within the meaning of the Federal Act, but only in light of this Court's interpretation of the California Act.

8. The Eel River is now a component of the California Wild and Scenic Rivers System subject to removal from the System by legislative action after January 1, 1985.

9. Federal law clearly gives the Governor the right to apply to the United States Department of the Interior and to represent, as he has done, that the five rivers meet the standard for inclusion of rivers in the National System. No provision of State law prohibits the making of the application, and the separation of powers doctrine prevents this Court from prohibiting the submission and processing of the Governor's application.

10. It is the province of the Secretary of the Interior to find, in accordance with this Court's interpretation of

the California Act, whether federal requirements for inclusion of the five rivers in the National System have been met.

JUDGMENT

The Court having made its findings of fact and conclusions of law,

IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. Under the California Act, neither the Governor nor the Secretary of Resources of the State of California presently has power to permanently administer the rivers that are components of the California System as wild, scenic or recreational rivers in the absence of legislatively-approved management plans, and until such management plans have been approved by the Legislature, neither official can guarantee that any of those rivers will be permanently administered as wild, scenic or recreational rivers.

2. The Governor of the State of California has the right to apply to the United States Department of the Interior for inclusion of such rivers in the National System, and the separation of powers doctrine prevents this Court from prohibiting the submission of such an application.

3. The alternative writ heretofore issued is discharged and the peremptory writs of mandamus applied for in this action are denied.

4. The injunctions prayed for in this action are denied.

5. Petitioners' prayer for attorneys' fees is denied.

DATED: April 7, 1981

FRED W. MARLER, JR.
Presiding Judge of the
Superior Court

Appendix R

United States Department of the Interior
Heritage Conservation and Recreation Service

Washington, D.C. 20243

Dated: 06/25/80

From: DIR

To: SWPO

Subject: Governor Brown's Pet Rivers

To SWPO: In particular, but as an advisory to all addresses:

Ron Way, staff assistant to A/S Herbst, called this PM from California to report on a meeting he had with staff people of Secretary Huey Johnson.

The points Ron and I made in our conversation are as follows:

1. Secretary Johnson's staff indicates they wanted to put together a "draft" of the Brown letter to Andrus on the five rivers in question: They want to "share" that draft with DOI prior to submitting it to the Governor. They, the staff, were unclear as to when the draft would be prepared, although Ron thought it would be "before August".

2. The staff indicated they would "pour money and people" into the process of study, and EIS for the rivers—no specifics were given. I told Way that I thought we should work closely with the Johnson staff in developing timelines, cost estimates and workload factors during the time in which the Governor's letter was being prepared, so that DOI would have an estimate of our capacity to do the job, at whatever level and to whatever degree of cooperation of the state,

and have that estimate well in mind when the Governor's letter arrived.

To be reprogramming "within the Department" in order to do the job, and I made it clear to him, other than "scoping the work," HCRS had scarce resources to do any work in this fiscal study cost HCRS $27,500, none of which had been previously budgeted and that "we were strapped."

4. Ron indicated that Johnson's staff thought there would have to be individual river EIS work and, possibly, for the cumulative rivers, (One big EIS)

5. Ron indicates the "rivers" story had not gotten to the press, but problem could not be much longer contained. Direction: To all addresses: In the event of a press inquiry on this matter, refer the call to Ward OPR.

6. Ron indicated Nagle was favorable to the effort, and saw it as a "rare opportunity." I indicated that I wanted started, if so directed. I further favored a Task Force (state/federal), with office in Sacramento, a joint announcement by Andrus/Brown, with Herbst attending for Andrus a press conference to indicate a joint effort. I want to make sure all, repeat all, are on board.

Appendix S

United States Department of the Interior
Heritage Conservation and Recreation Service
Washington, D.C. 20243

From: SWRO Dated: 07/21/80

To: DDR

Subject: Calif. W/S River 2(a)ii Request #1

This represents our initial assessment of the timing and costs would be involved in responding to Governor Brown's request to include certain Northern California streams as state administered rivers within the National Wild and Scenic Rivers System.

Background:

1. The state's request likely will include all of the river segments presently included as part of the California Wild and Scenic River System. The total river mileage is estimated at around 1,025 miles assuming consideration of the Smith River system will be confined to its major tributaries. The major river segments and estimated mileages are as follows:

	Miles
Klamath River	173
Scott River	24
Salmon River (including part S. Fork)	40
Wooley Creek	7
N. Fork Salmon	29
Trinity River	111
N. Fork Trinity	24
S. Fork Trinity	52
New River	20
Eel River	143
S. Fork Eel	63
M. Fork Eel	67
N. Fork Eel	31
Van Duzen River	46

(Table continued on following page)

(Continued from preceding page)

American	32
N. Fork American	48
Smith River	26
N. Fork Smith	26
S. Fork Smith	36
M. Fork Smith	24
	1,022

2. The State is seeking a final decision on its petition prior to Secretary Andrus' departure. It believes that the climate for positive response exists now and therefore, wants to have action taken prior to any change of personalities.

3. Both the San Francisco Examiner and San Francisco Chronicle carried articles over this past weekend referencing Governor Brown's request to Secretary Andrus to place the California North Coast Rivers under federal protection.

Timeline and budget:

We estimate that it will take under the most optimum conditions, 12 months to complete all of the work necessary for the Secretary to make a decision on the State's request. Meeting this time frame will require aggressive action within HCRS and the Department at each critical step as well as a major staff commitment by the State throughout both the Wild and Scenic River evaluation and EIS preparation processes. The time frame is dictated, in large part, by notification and review requirements imposed in the NEPA process. The estimated cost for the region to complete its assigned responsibilities is $53,000 which breaks down to $46,000 . . . for personnel costs, $4,900 for travel expenses, and $2,100 for printing and other costs.

A detail breakout of tasks, time requirements and costs follows:

Tasks to Complete the Wild & Scenic River Evaluation

	Time Frame	Work Months	Cost—Travel	Cost—Other
1. Receipt of Governor's request				
2. Public Notice of 2(a)ii action in Federal Register, along with notice of scoping meetings	7 wks	5 wm	$1,000	$200 (supplies)
3. HCRS initiates evaluation				
4. Conduct scoping meetings				
5. Field evaluation	2 wks	1 wk	$1,500	—
6. Complete evaluation	4 wks	2 wm	100	—
Subtotals	13 wks	8 wm	$2,600	—

Tasks to Complete the EIS

	Time Frame	Work Months	Cost—Travel	Cost—Other
1. Draft EIS preparation	12 wks	7.5 wm	$1,000	$ 100 (supplies)
2. HCRS/Dept. review	2 wks	—	—	—
3. Fed. Register listing & draft EIS circulation	8 wks	—	—	$ 900 (printing)
4. Preparation of final EIS	4 wks	3 wm	$ 500	—
5. HCRS/Dept. review	2 wks	—	—	—
6. Printing, Fed. Register listing & review period for final EIS	9 wks	—	—	$ 900 (printing)
7. Review comments & draft proposed secretarial decision	2 wks	1.5 wm	$ 500	
Subtotals	39 wks	12 wm	$2,000	$1,800
Grand totals	52 wks	20 wm	$4,900	$2,100

We are prepared to adjust our regional work priorities for the balance of this fiscal year to initiate this assignment. This can be done within the existing regional personnel expense ceiling through reassignment of on-board personnel from other program assignments. We would propose to slip our schedule on collecting Phase II river resource data and nomination work would defer preparation of a proposed rivers technical assistance publication; would

eliminate any substantive river technical assistance and consultation with federal agencies tied to the national rivers inventory; and would drastically scale back our cooperative management and Sikes Act work. As an interim action covering the balance of the fiscal year, these program shifts can be accomplished without too significant of an impact. Continuation of such impacts into fiscal year 81, however, would result in unacceptable negative impacts on this region's rivers program tied to the President's environmental message.

While we can accommodate the salary impact, there is a critical problem with travel. This region simply doesn't have any travel dollars available to divert to this effort. We would need an increase of $3,200 in our travel ceiling to accommodate the work involved should we be directed to undertake the work immediately upon receipt of the Governor's official request. Given the deteriorating weather conditions in the Northern California coastal areas in the fall, it is important that most of the required field work be completed as early as possible.

Issues:

In looking into the question of processing 2(a)ii river applications, a number of issues already have surfaced which we would appreciate responses to from WASO. These are:

1. Assuming that state administered rivers enjoy the same protection from federal initiated and assisted projects as do federal administered rivers, who is responsible for overseeing actions of federal agencies which impact the designated stream (state? federal agency(ies) owning land along the river? HCRS?)?

2. At what point, if any, does the amount of federal land within the corridor preclude consideration of state administration of a river? Stated differently—is there any

legal restriction on the percentage of or total acreage of federal land within a state administered river?

3. Do the limitations on federally administered rivers within the WSR system dealing with size of the river corridor area and land acquisition also apply to state administered components.

If so, are the proposals we are to evaluate restricted to that corridor size?

4. Can the Secretary of the Interior unilaterally make a decision affecting sizable holdings of other agencies not under his jurisdiction? If not, how do we handle Governor's request? Does it become a joint evaluation with the Department of Agriculture?

5. How do we deal with Indian lands involved with a state administered river?

6. In the absence of specifically approved and implemented management plans, what documentation is required by the State to justify adequate protection of the rivers? Who will make this determination? What level of control constitutes adequate protection?

7. Can the notice of intent to prepare an EIS and the dates for scoping meetings be handled at the same time the notice of the Governor's petition is made?

Brian O'Neill

Appendix T

EXHIBIT C

COOPERATIVE WORK AGREEMENT

Between

State of California Resources Agency and
Federal Heritage Conservation and
Recreation Service

Department of the Interior

The State of California has requested that the five rivers, including specific tributaries, which are currently included in the California Wild and Scenic Rivers System be added to the National Wild and Scenic Rivers System pursuant to Section 2(a)(ii) of Public Law 90-542 (see attachment A).

The California Resources Agency has primary responsibility for fulfilling State application requirements. The Heritage Conservation and Recreation Service (HCRS) has primary responsibility within the Department of the Interior to process the application.

In order to process the State's application in a timely fashion, the following work plan composed of the assignment of tasks, duties, and the time frame for completion has been established. Each agency will, to the best of its ability and available resources, do whatever is necessary to assure successful completion of this planned work schedule.

ASSIGNMENT OF DUTIES

Heritage Conservation and Recreation Service

1. Evaluate the rivers for eligibility in the National System; classify as wild, scenic, or recreational those

rivers or river segments found to be eligible; and provide reports outlining the findings.

2. Evaluate the adequacy of State measures and authorities to provide permanent administration of the rivers, including input from Solicitor's Office.

3. Provide direct management over development of the Environmental Impact Statement (EIS) that will be issued as a Federal document.

4. Assure public involvement in the National Environmental Protection Act (NEPA) process.

5. Enlist other Federal agencies to assist in the river evaluation and NEPA processes, including preparation and review of the EIS.

6. Prepare Secretarial Issue Document.

California Resources Agency

1. Provide State plan for protection of designated rivers, including evaluation of State statutory authorities and their implementation.

2. Perform major staffing required for developing information required for the EIS.

3. Provide resource data to assist HCRS in its wild and scenic rivers evaluation.

4. Provide technical support to HCRS in the conduct of public meetings which are part of the NEPA process.

5. Print the draft and final EIS.

MAJOR WORK PRODUCTS

1. Wild and Scenic River assessment of the rivers in the State's request to include: a) determination of the eligibility of each stream segment; and b) classification of each qualified stream segment as wild, scenic, or recreational.

2. Assessment of State's ability to permanently administer each stream.

3. An EIS that addresses the cumulative impacts of designation by the Secretary of the Interior of all or portions of the streams included in the State's request.

4. A Secretarial Issue Document displaying options available to the Secretary in responding to State's request.

Staff representatives of the Heritage Conservation and Recreation Service and the Resources Agency will agree on interim deadlines for completion of the subject documents in the time frame that would allow for a Secretarial decision to be reached by early January, 1981.

The work element of each product is as follows:

1. Wild and Scenic River Evaluation Work Element:

   A. Development of format and criteria for Wild and Scenic River evaluation

   B. Pre-field evaluation of river segments

   C. Field evaluation

   D. Field evaluation report

2. Management Assessment:

   A. State submittal of existing statutes and implementing procedures for Department of Interior (DOI) review.

   B. DOI provides informal critique of initial State submittal.

   C. State resubmits package to include its management concept plan for affected streams.

   D. DOI determination of adequacy of State long-term management.

3. Environmental Impact Statement:

A. HCRS/State workshop and development of work plan.

B. Federal Register: Notice of Intent Application, and Scoping.

C. EIS preparation begins.

D. Scoping meeting: San Francisco
Scoping meeting: Los Angeles
Scoping meeting: Eureka
Scoping meeting: Fresno

E. Draft EIS completed and sent to Washington.

F. HCRS and Office of Environmental Project Review, review completed and draft approved.

G. Draft EIS to printer.

H. Draft EIS printed.

I. Draft EIS to Environmental Protection Agency (EPA).

J. Federal Register notice: Draft EIS 45-day review period begins.

K. 45-day review period ends.

L. Public Meetings on Draft EIS.

M. Final EIS prepared and delivered to Washington.

N. HCRS-DOI, Office of Environmental Project Review review completed.

O. Final EIS printed.

P. Final EIS to EPA.

Q. Final EIS Notice of Availability appears in Federal Register, 30-day waiting period begins.

R. Final EIS 30-day waiting period ends.

4. Secretarial Issue Document (SID):
   A. Determination of SID format.
   B. Draft SID.
   C. DOI Review Complete.
   D. Secretarial Decision.

/s/ Huey D. Johnson

Secretary, The Resources
Agency, State of California
Date: August 20, 1980

/s/ Chris Therral Delaporte

Director, Heritage
Conservation and
Recreation Service, DOI
Date: August 20, 1980

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No. 84-544 (3)

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

ASSOCIATION OF CALIFORNIA WATER AGENCIES, et al.,
Petitioners,

vs.

UNITED STATES OF AMERICA, et al.,
Respondents.

ENVIRONMENTAL DEFENSE FUND, et al.,
Intervenors.

Petition for Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

CALIFORNIA FARM BUREAU FEDERATION, CALIFORNIA CATTLEMEN'S ASSOCIATION, CALIFORNIA CHAMBER OF COMMERCE, AND CALIFORNIA WOOL GROWERS ASSOCIATION FOR LEAVE TO FILE BRIEF AMICI CURIAE, [redacted] BRIEF AMICI CURIAE IN SUPPORT OF PETITIONERS

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23 pp

TABLE OF CONTENTS

Page

Motion of California Farm Bureau Federation, California Cattlemen's Association, California Chamber of Commerce, and California Wool Growers Association for leave to file brief amici curiae 1

Interest of California Farm Bureau Federation, California Cattlemen's Association, California Chamber of Commerce, and California Wool Growers Association 2

Substance of the brief amici curiae 3

Reasons for granting this motion 3

Brief of amici curiae California Farm Bureau Federation, California Cattlemen's Association, California Chamber of Commerce, and California Wool Growers Association 7

Argument 8

I

Lack of permanent administration should have excluded the Eel River from the Federal Wild and Scenic River System 8

II

The Ninth Circuit ignored clear evidence which rebutted the presumption of regularity of official acts 11

III

The Secretary's action failed the Administrative Procedures Act standard of review 14

Conclusion 17

TABLE OF AUTHORITIES CITED

Cases

Page

Alabama Nursing Home Assn. v. Harris, 617 F.2d 388 (1980) 12

Arizona v. California, 376 U.S. 340 (1963) 3

Bowman Transport v. Arkansas-Best Freight Systems, Inc., 419 U.S. 281 (1974) 15, 16

Burlington Truck Lines v. United States, 371 U.S. 156 (1962) 15

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1970) 11, 12, 13, 14, 15

Citizens to Preserve Wilderness Park, Inc. v. Adams, 543 F.Supp. 4 (D.C. Neb. 1981) 14, 15

County of Del Norte v. U.S., 732 F.2d 1462 (9th Cir. 1984) 11, 13, 14, 15

Hercules, Inc. v. EPA, 598 F.2d 91 (D.C. Cir., 1978) 11, 12

Johnson v. Shaughnessy, 336 U.S. 806 (1949) 12

June Oil and Gas, Inc. v. Andrus, 506 F.Supp. 1204 (D.C. Colo. 1981) 15

Kirkhuff v. Cleland, 516 F.Supp. 351 (D.C. D.C. 1981) .. 15

Mazaleski v. Truesdell, 562 F.2d 701 (D.C. Cir. 1977) 12

Mobil Oil Corp. v. Department of Energy, 610 F.2d 796, *certiorari denied* 446 U.S. 937 15

Movement Against Destruction v. Trainor, 400 F.Supp. 533 (D.C. MD. 1975) 14

Schwingel v. Harris, 631 F.2d 192 (2nd Cir., 1980) 12

Skinner v. U.S., 594 F.2d 824 (1979) 12

Smith v. City of Cookville, 381 F.Supp. 100 (D.C. Tenn. 1974) 14

United States v. Chemical Foundation, Inc., 272 U.S. 1 (1926) 11

TABLE OF AUTHORITIES CITED

Statutes

	Page
5 U.S.C. § 706	3, 15, 16
16 U.S.C.:	
§ 1271	3, 10
§ 1273(a)	8, 13
§ 1278(a)	10
§ 1286(d)	10
California Public Resources Code:	
§ 5093.50	3
§ 5093.54(d)	3, 4, 9, 13, 16
§ 5093.56	10
§ 5093.57	10
§ 5093.58	8, 9
California Stats. 1982 Ch. 1481 § 19	9

Other Authorities

3 K. Davis, Administrative Law Treatise § 17.6 (2nd ed. 1980)	11

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MOTION OF CALIFORNIA FARM BUREAU FEDERATION, CALIFORNIA CATTLEMEN'S ASSOCIATION, CALIFORNIA CHAMBER OF COMMERCE, AND CALIFORNIA WOOL GROWERS ASSOCIATION FOR LEAVE TO FILE BRIEF AMICI CURIAE

California Farm Bureau Federation, California Cattlemen's Association, California Chamber of Commerce, and the California Wool Growers Association respectfully move this Court for leave to file the accompanying brief amici curiae in support of Petitioners' position in this case.

INTEREST OF CALIFORNIA FARM BUREAU FEDERATION, CALIFORNIA CATTLEMEN'S ASSOCIATION, CALIFORNIA CHAMBER OF COMMERCE, AND CALIFORNIA WOOL GROWERS ASSOCIATION

The California Farm Bureau Federation is a voluntary, nongovernmental, nonprofit California corporation. Its primary purpose is to protect and foster agricultural interests throughout the State of California. Its members consist of 52 county Farm Bureaus with a combined membership at the close of its 1983 membership year of over 100,000 families. Over 85% of all commercial farmers in the State of California are members of the county Farm Bureaus.

The California Cattlemen's Association, an organization of approximately 4,000 beef cattle producers, represents this state's beef industry.

The California Chamber of Commerce is a voluntary, nonprofit, statewide business organization. The Chamber has more than 4900 members, including 160 trade associations from virtually every industry and geographic section in the state, including Northwestern California. Three hundred eighty-nine local Chambers of Commerce are affiliated with the California Chamber of Commerce. It is estimated that approximately 75 percent of the private sector work force in California is represented by the Chamber's membership and local affiliations.

California Wool Growers Association is a cooperative organization representing the sheep producers of California. It has approximately 1,100 members.

These organizations seek this Court's permission to express their views in this case because this Court's disposition of the question regarding the future of the North Coast Rivers will have profound implications for the future

water supply available for California business and agriculture and for the economic future of their members.

SUBSTANCE OF THE BRIEF AMICI CURIAE

The brief amici curiae, herein, discusses the relationship between those provisions of the California Wild and Scenic Rivers Act. Ca. Pub. Res. Code § 5093.50 *et seq.*, which concern the Eel River and the Federal Wild and Scenic Rivers Act, 16 U.S.C. § 1271, *et seq.*; and the applicability of the presumption of regularity of official acts and the standard of review of the Administrative Procedures Act, 5 U.S.C. § 706 to the action of the Secretary of Interior, Cecil Andrugs, in designating five California rivers as part of the National Wild and Scenic River System in 1981.

Since the clear language of Ca. Pub. Res. Code § 5093.54(d) designates the Eel River as a candidate for withdrawal in whole or in part from the State System, it did not meet the permanency criteria of the Federal Act. Therefore, its inclusion in the Federal System effectively rebuts the presumption of regularity of official administrative acts. Inclusion of the Eel River in the Federal System was arbitrary and capricious, a blatant and obvious abuse of discretion, and an expression of bad faith by the Secretary of Interior, justifying re-examination of the entire process of designation of the five California rivers by this Court.

REASONS FOR GRANTING THIS MOTION

Since this Court's decision in *Arizona v. California*, 373 U.S. 565 (1963), California has been limited to 4.4 million acre feet of Colorado River water. *Id.*, at 568. As a temporary measure, California has been able to lease an additional 962,000 acre feet unused by Arizona. However,

when the Central Arizona Project is completed in 1985, this surplus will no longer be available to meet California's shortfall. California Water Atlas, 45 (State of California, 1978). Ultimately, the state is two million acre feet short of meeting its long-term water needs. Petitioner's Appendix at A-51. Approximately one million acre feet of water could be supplied by the Eel River. Petitioner's Appendix at A-70.

California has yet to solve the problem of obtaining the necessary water. Traditionally, the North Coast Rivers have been seen as a possible solution to the problem. In 1972, the California Legislature specifically stated its intent to begin to study the Eel River after 1984 as a source of water to determine whether it should be deleted from the California Wild and Scenic River System. Ca. Pub. Res. Code § 5093.54(d).

Annually California farmers sell more than $13 billion worth of commodities. Almost half of all fruits and vegetables grown in the United States come from California. California agriculture contributes to the U.S. balance of trade in that $3 billion in agricultural commodities are exported annually.

California beef cattle herds total approximately five million head of beef cattle, representing a value of $2.55 billion.

California sheep producers maintain approximately 1,000,000 sheep. California is second only to Texas in value of wool production.

California produces more than 90% of the nation's annual production of almonds, apricots, dates, figs, kiwi, nectarines, olives, pistachios, pomegranates, prunes, and walnuts. It leads the nation in production of alfalfa seed, artichokes, asparagus, avocados, broccoli, brussels sprouts, cantaloupes, carrots, casaba melons, cauliflower, celery, crenshaw melons, cut flowers, eggs, garlic, grapes, honey-

dew melons, jojoba, ladino clover seed, lemons, lettuce, lima beans, fresh market mushrooms, nursery products, onions, oriental vegetables, peaches, pears, persian melons, persimmons, potted plants, rabbits, safflower, spinach, strawberries, and processing tomatoes. California Agricultural Summary (California Department of Food and Agriculture, 1984).

California agriculture and business interests are dependent on the availability of water to produce food and fiber for the rest of this nation and the world. The future projected water shortages will have an adverse impact on their ability to do so.

Many members of the amici organizations own lands adjacent to the streams at issue and have sought flood control protection which will not be possible under the restrictions of the Wild and Scenic Rivers Act.

Wherefore, the California Farm Bureau Federation, California Cattlemen's Association, California Chamber of Commerce, and California Wool Growers Association respectfully move this Court for leave to file the accompanying brief amici curiae.

Respectfully submitted,

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By THOMAS F. OLSON

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BRIEF AMICI CURIAE OF CALIFORNIA FARM BUREAU FEDERATION, CALIFORNIA CATTLEMEN'S ASSOCIATION, CALIFORNIA CHAMBER OF COMMERCE, AND CALIFORNIA WOOL GROWERS ASSOCIATION

A statement describing California Farm Bureau Federation, California Cattlemen's Association, California Chamber of Commerce, and California Wool Growers Association and their interest herein is set forth in the preceding motion requesting leave to file this brief amici curiae. Likewise, a summary of the following arguments is set forth in the preceding motion under the heading "Substance of the Brief Amici Curiae." The general concern of

the amici organizations in this case is based on their long standing policies for development of water resources, exemplified by the following policy statement adopted in December, 1983, by the House of Delegates of the California Farm Bureau Federation:

> "We are opposed to proposals which would prevent the economic development of a stretch of river which has potential resource value; which would necessitate the taking of scenic easements or fee title to privately owned land by eminent domain; or which would unnecessarily involve federal responsibility for a river which is being adequately managed by a state.
>
> Any land designated for wild rivers should be subject to local zoning ordinances.
>
> We oppose the expansion of the National and State Wild and Scenic Rivers System."

ARGUMENT

I

LACK OF PERMANENT ADMINISTRATION SHOULD HAVE EXCLUDED THE EEL RIVER FROM THE FEDERAL WILD AND SCENIC RIVER SYSTEM

The Federal Wild and Scenic Rivers Act (hereinafter the "Federal Act") requires that rivers in the Federal Wild and Scenic Rivers System (hereinafter the "Federal System") be permanently administered by an agency or political subdivision of the State concerned. 16 U.S.C. § 1273(a).

At the time the instant litigation commenced, California did not have permanent administration of the State's rivers in the California System, but the California Legislature had required the adoption of management plans for the rivers designated under the California Wild and Scenic Rivers Act (hereinafter the "California Act"). Ca. Pub.

Res. Code § 5093.58. The plans were never adopted and, finally, this requirement was repealed in 1982 with the Legislature declaring that the repeal of that provision was to have no effect on this litigation. Ca. Stats. 1982 Ch. 1481 § 19.

The repeal of the management plan requirement did not magically retroactively place the rivers under permanent administration in 1981, at the time of the designation. In addition, unique statutory provisions have kept one of the rivers, the Eel River, from permanent administration, then and now.

The California Legislature has gone to considerable trouble to preserve its options concerning the Eel River. The initial and present version of the law contained the following provisions regarding the Eel River:

> ". . . it is the intent of the Legislature, with respect to the Eel River and its tributaries that after an initial period of 12 years following the effective date of this chapter, the Department of Water Resources shall report to the Legislature as to the need for water supply and flood control projects on the Eel River and its tributaries and the Legislature shall hold public hearings to determine whether *legislation should be enacted to delete all or any segment of the river from the System.*" Ca. Pub. Res. Code § 5093.54(d), (*emphasis is added*).

Thus, the California Legislature clearly provided for possible removal of the Eel River from the California System. And equally clearly, the Secretary disregarded the fact that the Eel was not under permanent administration when he made his designation.

In addition, the California Legislature specifically authorized "geologic, hydrologic, economic or other technical

studies" by the Department of Water Resources in order to determine the feasibility of alternate sites for dams on the Eel River. Ca. Pub. Res. Code § 5093.56. However, dams are forbidden on rivers in the Federal System. 16 U.S.C. §§ 1271 and 1286(d).

Furthermore, the temporary flood control measures California law permits on the Eel are in direct contradiction to the Federal Act prohibition on the construction of any water resources project which would have a direct effect on the free-flowing nature of any river in the Federal System. 16 U.S.C. § 1278(a).

The measures were permitted by the California Legislature when it adopted the following provision for possible flood control on the Eel:

> "Nothing in this chapter shall be construed to prohibit any measures for flood protection, structural or non structural necessary for the protection of lives along the Eel River as described in subdivision (d) of Section 5093.54 except for dams, reservoirs or other water impoundment structures; provided however, that such measures for flood protection may include facilities for temporary flood storage or flood storage basins on the tributaries of the Eel River." Ca. Pub. Res. Code § 5093.57.

By virtue of these statutes the California Legislature has ordered studies specifically addressing the desirability of removal of the Eel River from the California Wild and Scenic River System and has permitted certain flood control measures. Nowhere does the Act state that the designation is permanent; to do so would contradict the plain meaning of the provisions that pertain to the Eel River.

Thus, it is clear that the permanency requirements of the Federal Act and the State Act provisions pertaining to the Eel River are in irreconcilable conflict.

II

THE NINTH CIRCUIT IGNORED CLEAR EVIDENCE WHICH REBUTTED THE PRESUMPTION OF REGULARITY OF OFFICIAL ACTS

Despite this statutory conflict, the Ninth Circuit Court of Appeals based its validation of the Secretary's action on the doctrine of the presumption of regularity of official acts.

"In the absence of clear evidence to the contrary, courts presume that public officers properly discharge their duties . . ." *County of Del Norte v. U.S.*, 732 F.2d 1462, at 1468 (9th Cir. 1984) citing 3 K. Davis, Administrative Law Treatise § 17.6 (2nd ed. 1980) and *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926).

The court ignored clear evidence to the contrary and misapplied the doctrine to the circumstances of the Secretary's action. As discussed below, if the pressumption is fully understood and applied, it is rebutted by the Secretary's action.

Cases subsequent to *Chemical Foundation, supra,* expanded on the doctrine as follows:

> "Except in cases where there is no accompanying explanation of the reasons underlying an administrator's decision, see *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402 at 417-419, a strong presumption of regularity supports the inference that when administrative officials purport to decide weighty issues within their domain they have considered the issues." *Hercules, Inc. v. EPA,* 598 F.2d, 91, 123 (D.C. Cir., 1978).

Lower courts have expressly stated that the presumption is a rebuttable one.

> "A presumption of validity attaches to the actions of administrative agencies . . . while the presumption is rebuttable, the burden of proof rests with the party challenging the agencies' action." *Alabama Nursing Home Assn. v. Harris* (1980) 617 F.2d 388, 393 (citations omitted); *Hercules, supra* 123.

And this court has applied the doctrine as if the presumption were rebuttable. In order to rebut the presumption of validity ". . . there must be clear evidence to the contrary showing bad faith or improper behavior." *Citizens to Preserve Overton Park, supra* at 420, followed in *Hercules, supra* at 123.

The presumption has been rebutted in cases where the record was silent as to an important issue (credibility) *Schwingel v. Harris,* 631 F.2d 192, 196 (2nd Cir., 1980); where the agency violated its own regulations, *Mazaleski v. Treusdell,* 562 F.2d 701, 717 (D.C. Cir. 1977); where the agency was aware of false information in the record and refused to remove it, *Skinner v. U.S.* 594 F.2d 824, 830 (1979); and where an agency refused to consider relevant evidence, *Johnson v. Shaughnessy,* 336 U.S. 806, 812 (1949).

Thus, this court should find that the presumption of regularity has been rebutted by the glaring irregularity of the Eel's inclusion in the Federal System.

This case is analagous to *Schwingel, supra,* and *Johnson, supra,* because the record does not indicate whether the Secretary even recognized that the Eel River was in a separate category from the other four rivers. The only indication in the record of familiarity with the Eel's status

is the grandiose and sweeping statement that the entire body of California law was considered. However, the meaninglessness of this statement is obvious, not only by its breadth but also by the rapidity with which this action moved through the Department of the Interior. *County of Del Norte v. U.S.A.*, 732 F.2d 1462 (9th Cir. 1984), Reply Brief for the Federal Appellants, at 6, 7.

In addition to the lack of support in the record, the presumption should be rebutted because the Secretary's action was characterized by both "bad faith and improper behavior," the criteria enunciated in *Overton Park* as necessary to trigger judicial review of agency action. The Secretary was guilty of bad faith in designating the Eel River "Wild and Scenic" because its actual status under California law which is best described as "protected for twelve years and then subject to review" and the status "under permanent administration" required by 16 U.S.C. § 1273 are logically inconsistent categories which cannot overlap. Ca. Pub. Res. Code § 5093.54(d).

Despite this logical impossibility, the Secretary claimed to base his decision on the entire body of California law and the State's prior conduct. *County of Del Norte, supra,* Reply Brief for the Federal Appellants, at 6, 7.

However, examination of the statute shows that he likewise could not conclude in good faith that the State was permanently committed to preserving the Eel River by virtue of its conduct prior to the expiration of the initial twelve year period. No conclusion about the long term intentions toward the Eel River can be made until after the studies mandated by Ca. Pub. Res. Code § 5093.54(d) are commenced in 1985.

Certainly, disregarding the law should be considered "improper behavior", the other criterion that can rebut the presumption. In fact, as Petitioner's brief points out, the statutory violations go so far beyond "improper conduct" as to abridge the sovereign rights reserved to the people of California under the 10th Amendment to the U.S. Constitution.

The significance of the Secretary's action regarding the Eel River was brought to the attention of the Ninth Circuit Court of Appeals. *County of Del Norte, supra,* Petition for Rehearing of ACWA Appellees. However, the Court ignored "clear evidence to the contrary" as required by this Court in *Overton Park* and upheld the Secretary's action.

III

THE SECRETARY'S ACTION FAILED THE ADMINISTRATIVE PROCEDURES ACT STANDARD OF REVIEW

Even if the presumption of regularity were not rebutted, the Secretary's action violated the Administrative Procedures Act. Although the Ninth Circuit should have found that the presumption of regularity was rebutted by the Secretary's conduct, the effect of the presumption has been abridged in recent years by the development of a body of law holding that the presumption does not shield agency action from review. *Citizens to Preserve Overton Park, supra,* 415; followed *Movement Against Destruction v. Trainor,* 400 F.Supp. 533 (D.C. Md. 1975); *Smith v. City of Cookville,* 381 F.Supp. 100 (D.C. Tenn. 1974); *Citizens to Preserve Wilderness Park, Inc. v. Adams,* 543 F.Supp. 4

(D.C. Neb. 1981); *Kirkhuff v. Cleland*, 516 F.Supp. 351 (D.C. D.C. 1981).

In *Overton Park*, the court gave the Secretary of Transportation the benefit of the presumption and then proceeded to review his action in terms of the Federal Administrative Procedures Act, 5 U.S.C. § 706. *Overton Park, supra*, p. 416. The standard of review is whether the agency action was "arbitrary and capricious." *Id.*; followed *Kirkhuff, supra.*

The Secretary's action in designating the Eel River for inclusion in the Federal System fails the Administrative Procedures Act standard of review enunciated in *Overton Park* and subsequent cases in that it was arbitrary and capricious, it was an abuse of discretion and it was contrary to law. 5 U.S.C. § 706.

This Court has articulated a threefold test for making a finding of arbitrary and capricious agency action in *Bowman Transport* as follows:

> "A reviewing court must 'consider whether the decision was based on (1) a consideration of relevant factors and (2) whether there has been a clear error of judgment . . .' *Citizens to Preserve Overton Park, supra*, at 416, (3) the agency must articulate a 'rational connection between the facts found and the choice made.' *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)." *Bowman Transport v. Arkansas-Best Freight Systems, Inc.*, 419 U.S. 281, 285 (1974) *renumbering added*, followed: *Mobil Oil Corp. v. Department of Energy*, 610 F.2d 796 (1979), *certiorari denied*, 446 U.S. 937. *June Oil and Gas, Inc. v. Andrus*, 506 F.Supp. 1204. (D.C. Colo. 1981).

The Secretary could not possibly have considered the second sentence of Ca. Pub. Res. Code § 5093.54(d) and included any part of the Eel River in his designation. Indeed, the record does not show that he did, except in the context of having considered all of California law. *County of Del Norte, supra,* Reply Brief for the Federal Appellants at 6, 7. Thus, the inevitable conclusion that relevant factors were not considered, satisfies the first element of the test for arbitrary and capricious agency actions. *Bowman, supra.*

Inclusion of the Eel River shows a clear error of judgment when viewed in the context of Ca. Pub. Res. Code § 5093.54(d). The Eel simply does not qualify for inclusion in the Federal System, and its inclusion satisfies the second requisite of the *Bowman, supra,* test of arbitrary and capricious agency actions.

And finally, the record is silent as to the existence of any rational connection between the facts regarding the Eel's status and the choice made. The final criteria for making a finding of arbitrary agency action is supplied by the absence of a "rational connection between the facts found and the choice made." *Bowman, supra.* Thus, the action was "arbitrary and capricious" under the legal definition of that expression, thereby violating the requisites of the Administrative Procedures Act, 5 U.S.C. § 706.

CONCLUSION

The Eel River should not have been included in the Federal System because it was not and is not under permanent administration. The presumption of regularity of official acts should be rebutted by the Secretary's action in designating the Eel River to the Federal System. The presumption does not shield the Secretary from review under the Administrative Procedures Act. The Administrative Procedures Act was violated because the action was arbitrary and capricious under the definition of that term developed by the Courts.

Wherefore, amici curiae, California Farm Bureau Federation, California Cattlemen's Association, California Chamber of Commerce, and California Wool Growers Association respectfully pray that this Court grant the writ of certiorari and reverse the decision below.

Respectfully submitted,

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Nos. 84-544 and 84-553

In the Supreme Court of the United States

OCTOBER TERM, 1984

ASSOCIATION OF CALIFORNIA WATER AGENCIES, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

COUNTY OF DEL NORTE, CALIFORNIA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether alleged procedural irregularities in the timing of the Secretary of the Interior's designation of parts of five northern California rivers as components of the national Wild and Scenic Rivers System required setting aside the designation notwithstanding petitioners' inability to demonstrate any prejudice flowing from the alleged irregularities.

2. Whether the Secretary of the Interior correctly determined that the State of California would be able to "permanently administer[]" the rivers as wild, scenic, or recreational, as required by the Wild and Scenic Rivers Act, 16 U.S.C. 1273(a)(ii).

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 2

Statement 2

Argument 11

Conclusion 15

TABLE OF AUTHORITIES

Cases:

Andrus v. *Sierra Club*, 442 U.S. 347 12

Baltimore Gas & Electric Co. v. *NRDC*, 462 U.S. 87 11

Chevron U.S.A., Inc. v. *NRDC*, No. 82-1005 (June 25, 1984) 13

County of Del Norte v. *Andrus*, No. C-80-3964-WAI (N.D. Cal. Nov. 14, 1980) 6

Environmental Defense Fund, Inc. v. *Corps of Engineers*, 470 F.2d 289, cert. denied, 412 U.S. 931 14

Portland Cement Ass'n v. *Ruckelshaus*, 486 F.2d 375, cert. denied, 417 U.S. 921 14

United States v. *Ortiz*, 422 U.S. 891 15

Vermont Yankee Nuclear Power Corp. v. *NRDC*, 435 U.S. 519 11

Page

Constitution, statutes and regulations:

U.S. Const. :

Art. III 14

Amend. X 15

Administrative Procedure Act, 5 U.S.C. 706 12

National Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(C) 6

Wild and Scenic Rivers Act, 16 U.S.C. 1271 *et seq.* 2

16 U.S.C. 1271 2

16 U.S.C. 1273(a)(i) 3

16 U.S.C. 1273(a)(ii) 3, 4, 5, 6

16 U.S.C. 1278(a) 2

16 U.S.C. 1283(a) 2

Cal. Pub. Res. Code (West Supp. 1984):

§ 5093.50 3
§ 5093.54 3
§ 5093.55 4
§ 5093.61 4

40 C.F.R. :

Section 1500.3 12
Section 1506.9 ..... 7, 8, 9
Section 1506.10 ..... 7, 9
Section 1506.10(b)(2) 7, 8, 10
Section 1506.10(c) 6

Page

Miscellaneous:

45 Fed. Reg. 83031 (1980) 7

H.R. Rep. 1623, 90th Cong., 2d Sess. (1968) 3

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A10)[1] is reported at 732 F.2d 1462. The opinion of the district court (Pet. App. A21-A34) is not reported.

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[1]"Pet. App." refers to the appendix to the petition in No. 84-544.

JURISDICTION

The judgment of the court of appeals was entered on May 11, 1984. A petition for rehearing was denied on July 5, 1984 (Pet. App. A11). The petition for a writ of certiorari in No. 84-544 was filed on October 2, 1984, and the petition for a writ of certiorari in No. 84-553 was filed on October 3, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves a challenge by several California counties and entities representing timber and water development interests to the Secretary of the Interior's designation of portions of five northern California rivers as components of the national Wild and Scenic Rivers System.

1. a. In 1968, Congress enacted the Wild and Scenic Rivers Act, 16 U.S.C. 1271 *et seq.*, declaring "that certain selected rivers of the Nation which, with their immediate environments, possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values, shall be preserved in free-flowing condition, and that they and their immediate environments shall be protected for the benefit and enjoyment of present and future generations" (16 U.S.C. 1271). To preserve these rivers in their natural free-flowing condition, the Act forbids any department or agency of the United States from assisting "in the construction of any water resources project that would have a direct and adverse effect on the values for which such river was established" (16 U.S.C. 1278(a)). The Act also directs the heads of all federal agencies to "take such action * * * as may be necessary to protect such rivers in accordance with the purposes of [the Act] * * *. Particular attention shall be given to scheduled timber harvesting, road construction, and similar activities which might be contrary to the purposes of [the Act]" (16 U.S.C. 1283(a)). In establishing this protective scheme, Congress expressed

its commitment to the principle that "just as the Nation has set aside some of its land areas in national parks, national monuments, national historic sites, and the like, so some of its streams which have exceptional values * * * — scenic, recreational, esthetic, and scientific — ought to be preserved for public use and enjoyment." H.R. Rep. 1623, 90th Cong., 2d Sess. 3 (1968).

Rivers may be designated as part of the system in two ways. Section 2(a)(i) of the Act, 16 U.S.C. 1273(a)(i), provides that Congress may designate rivers for inclusion in the system. Alternatively, Section 2(a)(ii) of the Act, 16 U.S.C. 1273(a)(ii), authorizes the Secretary of the Interior to designate rivers for inclusion in the system. Before the Secretary may designate a river under Section 2(a)(ii), he must find that (1) the river has been designated by the state legislature as wild, scenic, or recreational; (2) the river is to be "permanently administered" as wild, scenic, or recreational "by an agency or political subdivision of the State"; and (3) the river meets the criteria set forth in the Act for classification as wild, scenic, or recreational "and such criteria supplementary thereto as [the Secretary] may prescribe" (16 U.S.C. 1273(a)(ii)).

b. In 1972, the California legislature, at the request of the Governor of California, gave state protection to five northern California rivers. Cal. Pub. Res. Code § 5093.54 (West Supp. 1984). By designating these rivers as wild, scenic, or recreational, the California legislature expressed its intent that they "shall be preserved in their free-flowing state, together with their immediate environments, for the benefit and enjoyment of the people of the state." Cal. Pub. Res. Code § 5093.50. In order that the preservation mandate might be fulfilled, the California legislature imposed a number of permanent protective restrictions on the rivers. The legislature undertook to maintain the free-flowing character and outstanding anadromous fishery values of the

rivers by prohibiting all dams, reservoirs, diversions, and other water impoundment facilities. Cal. Pub. Res. Code § 5093.55. The legislature also enacted a "consistency clause" under which all state and local agencies are required to exercise their powers "in a manner consistent with the provisions" of the state statute. Cal. Pub. Res. Code § 5093.61. By taking this action, the legislature guaranteed that the full panoply of state environmental laws (*e.g.*, California Coastal Act, California Environmental Quality Act, California Forest Practices Act, Porter-Cologne Water Quality Act) would be applied by each state and local agency to preserve the wild, scenic, and recreational characteristics of these rivers.

On July 18, 1980, the Governor of California filed an application to place 4,006 river miles of these five rivers in the federal Wild and Scenic Rivers System. On August 1, 1980, the Secretary of the Interior acknowledged receipt of the Governor's application and indicated that it would have to be supported by, among other things, "a practical plan which meets criteria of the [federal] Wild and Scenic Rivers Act for protection and administration of each of the rivers and their related land resources * * *." DX 16, at 1. To fulfill this requirement, the State submitted an extensive report, over 100 pages long, that explained in detail the administrative capabilities of California's state and local agencies. In this document, the State explained how it would satisfy the federal requirement (16 U.S.C. 1273(a)(ii)) that the rivers be "permanently administered" as wild, scenic, or recreational.

2. On December 5, 1980, Judge Fred W. Marler, Jr. of the State Superior Court for Sacramento County issued a memorandum opinion in *County of Del Norte* v. *Brown*, No. 292019 (Pet. App. A182-A189). In that lawsuit, several California counties and California water interests — including some of the petitioners here — challenged the authority

of the Governor to submit the Section 2(a)(ii) application prior to the approval of river management plans by the California legislature. Judge Marler denied the plaintiffs' request to require the Governor to withdraw the Section 2(a)(ii) application, concluding that state law did not bar the Governor from submitting an application and that whether the rivers should be included in the federal system was a question of federal law (Pet. App. A186-A187). Although he refused to order the Governor to withdraw the application, Judge Marler wrote in dictum that, in the absence of legislatively-approved management plans, neither the Governor nor the State Resources Secretary had authority under state law to commit the State to permanently administer the rivers under the state wild and scenic rivers statute (*id.* at A186, A188). Recognizing that his interpretation on this point could in no way affect the Secretary's determination as to whether or not California's application met the federal standards of Section 2(a)(ii), Judge Marler qualified his dictum by emphasizing that "it is then the province of the Secretary of the Interior to find in accordance with the Court's interpretation of the California Act whether federal requirements for inclusion of these rivers in the national system have been met" (Pet. App. A187).

Judge Marler's opinion was analyzed by Department of the Interior officials and presented to the Secretary in at least five decisionmaking documents. The significance of Judge Marler's dictum was summarized in an 18-page review of California's ability to permanently administer the five rivers that was submitted to the Secretary as part of the final decision making package. Evaluation of California's Ability to Permanently Administer State Protected Rivers in Conformance with Federal Wild & Scenic River Legislation (DX 36) [hereinafter cited as *Evaluation*]. In concluding that California had demonstrated its ability to satisfy the "permanent administration" requirement of federal law, the *Evaluation* stated (at 2 (emphasis in original)):

> In addition to reviewing those authorities which were addressed in the State Court decision, our analysis has also considered the corollary authorities which are set forth in the State application. * * * We have considered in our analysis the entire body of California law providing the Resources Agency and other State and local agencies authority for protecting the resource values of the rivers nominated. *Our analysis indicates that the State's program of action adequately protects the rivers' values.*

3. After determining that a Section 2(a)(ii) designation based on the State's application would constitute a "major Federal action[]" requiring preparation of an environmental impact statement (EIS) pursuant to Section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332(2)(C), the Department of the Interior began to prepare a draft EIS on the proposal. A draft EIS was issued on September 16, 1980, and ten public hearings were held to obtain comments on that document. On November 14, 1980, at the behest of some of the petitioners, the district court issued a temporary restraining order extending the comment period on the draft EIS. *County of Del Norte* v. *Andrus*, No. C-80-3964-WAI (N.D. Cal.). The order was dissolved on December 1, 1980, for lack of jurisdiction, and the comment period was closed on December 5, 1980 (resulting in a comment period more than a month longer than the 45 days required by the regulations of the Council on Environmental Quality (see 40 C.F.R. 1506.10(c)).

On Friday, December 12, 1980, an Interior employee filed the final EIS (FEIS) with the Environmental Protection Agency and signed an EPA form verifying that distribution of that document had been completed. Copies of the FEIS were available on that date at Interior's offices in San Francisco and Washington, D.C., as well as at EPA's offices in Washington, D.C. Full distribution of the FEIS was

completed on Monday, December 15. By Wednesday, December 17, copies of the FEIS were available in quantity to the public, and copies were obtained by petitioners' counsel on that date. Also on that date, EPA published a Notice of Availability of the FEIS in the Federal Register. 45 Fed. Reg. 83031 (1980). Interior relied on the December 17 publication date for purposes of calculating the 30-day waiting period for final agency action imposed by 40 C.F.R. 1506.10(b)(2).

4. After two preliminary versions of a Secretarial Issue Document (SID) were distributed for review within the Department of the Interior, the final SID was issued on January 16, 1981. Former Secretary Cecil D. Andrus signed the decision option sheet of the SID (which had been given to him several days before) on January 19, 1981.[2] The Secretary's decision designated only 1,235 of the 4,006 river miles the Governor had proposed for inclusion in the national system. (Petitioners' statement (84-544 Pet. 2) that 2,400 river miles were placed in the System is incorrect.) Nearly three-fourths of the river mileage listed in the State's application was denied inclusion based on the Secretary's determination that it did not qualify under the eligibility requirements of the federal Act.

5. In early 1981, two substantially similar suits were filed by timber interests and water development interests — petitioners here — seeking to invalidate the Secretary's designation. Petitioners alleged that the Secretary's designation was invalid because (1) the FEIS was inadequate; (2) Interior had failed to follow two Council on Environmental Quality (CEQ) regulations, 40 C.F.R. 1506.9 and 1506.10,

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[2]On January 15 and 16, 1981, respectively, the United States District Courts for the Districts of Oregon and Northern California had enjoined the decisionmaking process. These injunctions were vacated by the Ninth Circuit on January 19, 1981 (Pet. App. A80-A81).

relating to the timing of EISs; and (3) the Secretary acted arbitrarily and capriciously in concluding that California had the ability to permanently administer the rivers as wild, scenic, or recreational rivers. The State of California and a number of environmental organizations were granted leave to intervene as defendants.

On February 9, 1983, the district court ruled in favor of petitioners, holding, inter alia, that the Secretary's designation was defective because of procedural irregularities (Pet. App. A21-A34). The court's basic holding was that the Secretary's decision was a nullity because he was not authorized to reach a decision on January 19, 1981. CEQ regulations provide for a 30-day waiting period between publication of the Notice of Availability of the FEIS in the Federal Register and final agency action. 40 C.F.R. 1506.10(b)(2). It is undisputed that 33 days actually elapsed between publication of the Notice of Availability and the Secretary's decision. The district court ruled, however, that the December 17 Federal Register notice was invalid because the notice should not have been published until the week of December 22. Thus, according to the district court's reasoning, the Secretary was barred by the 30-day waiting requirement from taking any action on the Governor's recommendation until January 21, 1981 (when his successor had assumed office). Pet. App. A24-A25.[3]

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[3]The district court's ruling that the timing of the Federal Register notice was improper rested on the court's conclusion that certain preconditions for publication of a Notice of Availability had not been satisfied as of December 17. The court relied, first, on Section 1506.9 of the CEQ regulations, which states in pertinent part:

> Statements shall be filed with EPA no earlier than they are also transmitted to commenting agencies and made available to the public.

As previously noted, a copy of the Final EIS was filed with EPA on December 12. However, the district court concluded that copies of the FEIS were not "available" to the public within the meaning of 40 C.F.R.

In addition, the district court ruled that petitioners were entitled to summary judgment on the issue of whether the Secretary had acted arbitrarily and capriciously in concluding that California could "permanently administer" the designated rivers as wild, scenic, or recreational rivers (Pet. App. A28-A31). The court acknowledged that the question of permanent administration was a matter of federal law, that it was within the Secretary's discretion to determine the adequacy of the State's ability to comply with the permanent administration requirement, and that the state court opinion had been brought to the Secretary's attention by the Secretarial Issue Document (*id.* at A29, A31). Nevertheless, the court held that the "full import [of the state court decision] was not set forth, and secretarial consideration may thereby have been unduly limited" (*id.* at A31).

6. The court of appeals reversed (Pet. App. A1-A10). The court first held that "any violation of [CEQ's timing regulations, 40 C.F.R. 1506.9 and 1506.10] must be regarded as insignificant and within the scope of another portion of the same series of regulations which provides that trivial violations shall not form the basis for independent causes of

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1506.9 until the mailing of the Final EIS to all those on the Interior Department's mailing list was completed on December 15. Thus, according to the district court, the Final EIS was not effectively filed with EPA until December 15.

The district court also cited the following language from Section 1506.10 of the CEQ regulations:

> The Environmental Protection Agency shall publish a notice in the Federal Register each week of the environmental impact statements filed during the preceding week.

The district court ruled that this section creates a mandatory requirement that the EPA delay publication of the Federal Register notice until the week following the effective filing date. Since effective filing purportedly did not occur until December 15, the court concluded that publication of the Federal Register notice should have been delayed until the week of December 22.

action. 40 C.F.R. § 1500.3 (1983)" (Pet. App. A2-A3). At the outset, the court noted (*id.* at A2 (footnote omitted)):

> It is apparent from the record that the State of California, which originally proposed the designation, and the Heritage Conservation and Recreation Service (HCRS), the Department of the Interior division which processed the application, favored expeditious completion of all NEPA requirements so that action could be taken on the proposal before the Carter administration left office. It is equally apparent that those opposing designation, including [petitioners] in this case, wished to delay final consideration by the Secretary until the new President took office.

The court of appeals then reviewed the chronological facts relevant to the EIS process. These facts showed that "the agency followed all timing requirements for preparation of the EIS itself"; that the comment period on the draft EIS was substantially longer than required by CEQ's regulations; that the Notice of Availability of the FEIS was accurate when it appeared on December 17 because the FEIS was then available; and that more than the 30 days required by 40 C.F.R. 1506.10(b)(2) had passed when the Secretary designated the rivers on January 19, 1981 (Pet. App. A5). In light of these facts, the court of appeals concluded (*id.* at A7):

> The integrity of the decision making process within the government and the public's opportunity to comment in accordance with all legal requirements were not compromised in any way.

In addition, the court of appeals rejected the district court's conclusion that the Secretary had not been fully apprised of the state court decision that the rivers could not, under state law, be "permanently administered" as wild, scenic, or recreational. The court of appeals summarized its conclusion as follows (Pet. App. A10):

> Full review of the record reveals * * * that the [state court] decision was both paraphrased in a memorandum to the Secretary and attached in full as an addendum to that memorandum. The Secretarial Issue Document noted the state court opinion, but concluded that sufficient other state law protections existed to satisfy the permanent administration requirement under the federal act. The record thus belies the contention that the state court opinion was not considered. In the absence of clear evidence to the contrary, courts presume that public officers properly discharge their duties, including reading memoranda addressed to them.

ARGUMENT

The decision of the court of appeals is correct, and it does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review by this Court is not warranted.

1. The court of appeals correctly ruled that the Secretary's designation should not be set aside, concluding that the allegedly "premature" publication of the Notice of Availability in the Federal Register did not deprive any interested party of his right to comment on the EIS. In *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 558 (1978), and *Baltimore Gas & Electric Co.* v. *NRDC*, 462 U.S. 87 (1983), this Court explained that agency action may be reversed only for substantial procedural defects that prevent the public "from making as full a presentation as desired" (462 U.S. at 108). No such defect infected the EIS process in this case; indeed, petitioners have admitted as much by defining the "prejudice" to their interests as the identity of the decisionmaker (84-544 Pet. 26-27; 84-553 Pet. 19-20). The court of appeals correctly held that this "interest" is not protected by NEPA's procedural provisions (Pet. App. A5):

> The irregularity in filing the notice before circulation * * * had no effect whatsoever on [petitioners'] opportunity to review the EIS after publication of the notice; nor did it affect the opportunity of the interested agencies and members of the public to review the statement for 30 days following publication. The "premature" publication about which [petitioners] complain is significant only because delay of a week in publication would have prevented the matter from being decided by Secretary Andrus rather than by his successor.

The court of appeals also correctly concluded that any deviation from CEQ's timing regulations was "trivial" within the meaning of those regulations. In anticipation of just this type of lawsuit, the CEQ regulations provide that "[i]t is the Council's intention that any trivial violation of these regulations not give rise to any independent cause of action" (40 C.F.R. 1500.3).[4] Similarly, the Administrative Procedure Act, 5 U.S.C. 706, directs courts not to become embroiled in quibbles about agency action unless the error is "prejudicial." No such error occurred in this case. Petitioners never argued that the timing of the Secretary's decision actually precluded them from presenting any relevant information to the Secretary or that they were in any way prejudiced.[5] In short: "The integrity of the decisionmaking

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[4]The court of appeals properly deferred to CEQ's interpretation of its own regulations. See *Andrus* v. *Sierra Club*, 442 U.S. 347, 358 (1979). Moreover, as explained in the declaration of William Hedeman, Director, Office of Federal Activities, EPA, the procedure for filing and distributing EISs and publishing Notices of Availability that was followed in this case has been employed frequently by EPA. The Hedeman declaration explains that the intent of the CEQ regulations is fully satisfied so long as the FEIS is available to the public at the time the Notice of Availability is published. Petitioners do not dispute that the FEIS in this case was in fact available on the December 17 publication date.

[5]Notwithstanding petitioners' allegations of political improprieties (84-544 Pet. 26-27; 84-553 Pet. 19-20), we note that the district court rejected the contention that political motivations undermined the objectivity of the decisionmaking process (Pet. App. A28), and the court of appeals did not disturb that finding.

process within the government and the public's opportunity to comment in accordance with all legal requirements were not compromised in any way" (Pet. App. A7).

2. The court of appeals properly reversed the district court's second reason for overturning the Secretary's decision, namely, that the "full import" of the California state court decision had not been brought to the Secretary's attention when he made his decision. The district court's ruling was wrong for at least three reasons. First, as the state court itself recognized (Pet. App. A186-A187), whether the State of California can satisfy the "permanent administration" requirement of the federal Wild and Scenic Rivers Act is a matter of federal, not state, law. The Secretary's interpretation of the state court's analysis of the term "permanent administration" (which the state court itself recognized as dictum) amounted to the interpretation of federal law he was entrusted to administer, and, as such, was entitled to deference. See, *e.g., Chevron U.S.A., Inc.* v. *NRDC*, No. 82-1005 (June 25, 1984), slip. op. 6-7.[6] Second, that portion of the state statute requiring legislative approval of river management plans (upon which the state court's dictum

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[6]Although petitioners deny that the Secretary had any discretion to determine the weight to be accorded the state court decision, the *Evaluation* (at 1) clearly explains the discretionary nature of the Secretary's decision on the "permanent administration" requirement:

> No State can make an irrevocable commitment that a particular river will remain in a State system forever. Because each State, as an element of its sovereignty, reserves the option to amend, modify, or repeal a river designation, the "permanent" standard of the Federal law must be viewed in this relative, rather than absolute context. It follows that the permanency of a State's commitment is a matter for the exercise of reasoned, discretionary judgment by the Secretary of the Interior.

This analysis also disposes of petitioners' contention (84-544 Pet. 14-16; 84-553 Pet. 15 n.5) that the California legislature's designation of the Eel River was too conditional to satisfy the standards of the federal statute.

rested) was repealed on September 27, 1982, by California Assembly Bill No. 1349 (Pet. App. A111-A113); hence, this issue had already become moot before the district court invalidated the Secretary's decision.[7] Third, as the court of appeals recognized, the Secretary was presented with the state court decision; he concluded, however, that other provisions of state law provided adequate protection to satisfy the "permanent administration" requirement imposed by federal law (Pet. App. A10; see pages 5-6, *supra*).

3. Finally, petitioners' challenge (84-544 Pet. 27-29; 84-553 Pet. 20-23) to the propriety of the court of appeals' grant of summary judgment to the government on all issues, including the adequacy of the FEIS, raises no issue warranting intervention by this Court. The full administrative record, including the FEIS, was before the Ninth Circuit, and that court was fully able to gauge whether plaintiffs' NEPA challenges were substantial or whether the issue of NEPA compliance was being used as a "tactic of litigation and delay." *Portland Cement Ass'n* v. *Ruckelshaus*, 486 F.2d 375, 384 (D.C. Cir. 1973), cert. denied, 417 U.S. 921 (1974) (footnote omitted). See, *e.g.*, *Environmental Defense Fund, Inc.* v. *Corps of Engineers*, 470 F.2d 289, 301 (8th Cir. 1972), cert. denied, 412 U.S. 931 (1973), in which the court stated:

> Ordinarily, we would remand the matter to the trial court for such review, but it is not necessary to do so in

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[7]In deleting the requirement for river management plans from the state statute, the California legislature specified (Pet. App. A139) that its action was not to affect this litigation. But it was of course not open to the state legislature to attempt to override the strictures of Article III of the Constitution. And even if one were to assume that a case or controversy survived the amendment of the state statute, the exercise of this Court's certiorari jurisdiction to review the relationship between a discretionary federal decision and a state statute no longer in existence clearly is not warranted.

this case. The complete record, including the environmental impact statement and the transcript of the proceeding below, is before us. We have reviewed the record thoroughly and are convinced that even if all factual disputes are resolved in favor of the plaintiffs, the decision of the Corps to complete the dam cannot be set aside as arbitrary and capricious.

No different result is called for in the instant case.[8]

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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[8]Petitioners' attempt (84-544 Pet. 20-21; 84-553 Pet. 1) to inject a Tenth Amendment claim into this case is unavailing for it was not raised before the district court or the court of appeals. See, *e.g.*, *United States* v. *Ortiz*, 422 U.S. 891, 898 (1975). In any event, it is clear that the secretarial designation made at the specific request of the Governor of California raises no Tenth Amendment issue.

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Nos. 84-544 & 84-553

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ASSOCIATION OF CALIFORNIA WATER AGENCIES, *et al.*,
Petitioners,

vs.

UNITED STATES OF AMERICA, *et al.*,

and

ENVIRONMENTAL DEFENSE FUND, *et al.*,
Respondents.

COUNTY OF DEL NORTE, *et al.*,
Petitioners,

vs.

UNITED STATES OF AMERICA, *et al.*,

and

ENVIRONMENTAL DEFENSE FUND, *et al.*,
Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
LIST OF CORPORATE PARTIES' PARENT COMPANIES, SUBSIDIARIES, AND AFFILIATES	ii
TABLE OF AUTHORITIES	iii
QUESTIONS PRESENTED	v
STATEMENT OF THE CASE	2
I. THE NATIONAL WILD AND SCENIC RIVERS ACT	2
II. GOVERNOR BROWN'S APPLICATION AND SECRETARY ANDRUS' DESIGNATION	4
III. THE LITIGATION	6
REASONS WHY THE WRIT SHOULD BE DENIED	11
I. THE COURT OF APPEALS' PROPER DEFERENCE TO THE CEQ'S INTERPRETATION OF ITS OWN REGULATIONS DOES NOT MERIT REVIEW BY THIS COURT	11
II. THE COURT OF APPEALS CORRECTLY APPLIED THE DECISIONS OF THIS COURT IN CONCLUDING THAT THE SECRETARY DID NOT ACT ARBITRARILY OR CAPRICIOUSLY	13
III. THERE IS NO REASON FOR THIS COURT TO REVIEW THE SECRETARY'S DISCRETIONARY DECISION TO DESIGNATE THE RIVERS	14
IV. THIS COURT SHOULD NOT REVIEW THE COURT OF APPEALS' DECISION THAT NO TRIABLE ISSUES OF FACT EXIST TO SUPPORT PLAINTIFFS' CLAIM THAT THE FINAL EIS WAS INADEQUATE	18
CONCLUSION	19

LIST OF CORPORATE PARTIES' PARENT COMPANIES, SUBSIDIARIES, AND AFFILIATES

In accordance with Supreme Court Rule No. 28.1, the parent companies, subsidiaries, and affiliates of each Respondent that is a corporation are as follows:

The Sierra Club is affiliated with the Sierra Club Legal Defense Fund and the Sierra Club Foundation, which are California non-profit corporations, and with the Sierra Club of Ontario, the Sierra Club of Ontario Foundation, and the Sierra Club of Western Canada, which are Canadian non-profit corporations. The Sierra Club has no parent companies or subsidiaries.

The Environmental Defense Fund and California Trout, Inc. have no parent companies, subsidiaries, or affiliates.

TABLE OF AUTHORITIES

CASES	PAGE(S)
Andrus v. *Sierra Club*, 442 U.S. 347 (1979)	18
California v. *Block*, 690 F.2d 753 (9th Cir. 1982)	7
Chevron, U.S.A., Inc. v. *Natural Resources Defense Council, Inc.*, 104 S. Ct. 2778 (1984)	17
Citizens to Preserve Overton Park, Inc. v. *Volpe*, 401 U.S. 402 (1971)	14
Coalition For Canyon Preservation v. *Bowers*, 632 F.2d 774 (9th Cir. 1980)	19
Conservation Law Foundation of New England, Inc. v. *GSA*, 707 F.2d 626 (1st Cir. 1983)	19
County of Del Norte v. *Andrus*, No. C 80 3964 WAI (N.D. Cal. filed Jan. 16, 1981)	6
County of Del Norte v. *Andrus*, No. 81-4030 (9th Cir. filed Jan. 19, 1981)	6
County of Del Norte v. *Brown*, No. 292019 (Cal. Super. Ct. Sacramento Co. filed Dec. 5, 1980)	9, 16
County of Del Norte v. *United States*, 732 F.2d 1462 (9th Cir. 1984)	*passim*
County of Josephine v. *Andrus*, No. CV 81-34 (D. Ore. filed Jan. 15, 1981)	5, 6
County of Josephine v. *Andrus*, No. 81-3036 (9th Cir. filed Jan. 19, 1981)	6
FTC v. *Grolier, Inc.*, 462 U.S. 19 (1983)	18
Izaak Walton League of America v. *Marsh*, 655 F.2d 346 (D.C. Cir.), *cert. denied*, 454 U.S. 1092 (1981)	19
Kleppe v. *Sierra Club*, 427 U.S. 390 (1976)	18, 19
Motor Vehicle Manufacturers Association v. *State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983)	14
Pacific Coast Medical Enterprises v. *Harris*, 633 F.2d 123 (9th Cir. 1980)	12
Rogers v. *Lodge*, 458 U.S. 613 (1982)	18
Sierra Club v. *Sigler*, 695 F.2d 957 (5th Cir. 1983)	12
Strycker's Bay Neighborhood Council, Inc. v. *Karlen*, 444 U.S. 223 (1980) (per curiam)	19
United States v. *Lovasco*, 431 U.S. 783 (1977)	18
Vermont Yankee Nuclear Power Corp. v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978)	9

STATUTES — PAGE(S)

California Wild and Scenic Rivers Act, California Public Resources Code
Section 5093.54 (West. Supp. 1984) 4, 16
Section 5093.545 (West Supp. 1984) 4
Section 5093.58 (West Supp. 1982), *repealed by* Cal. Stats. 1982, ch. 1481, p.8004, § 10 ..... 10, 15
National Wild and Scenic Rivers Act, 16 U.S.C.
Section 1271 2
Section 1273(a)(i) 3
Section 1273(a)(ii) 3, 15, 16
Section 1274(a)(1)-(10) 3
Section 1278(c) 2
Section 1280(a)(iii) 2
Section 1283(a) 2

REGULATIONS

40 C.F.R.
Section 1500.3 ..... 8, 11, 12
Section 1506.9 ..... 7, 8, 12
Section 1506.10 ..... 4, 5, 7, 8, 12

OTHER AUTHORITIES

Application from Governor Brown to Secretary Andrus pursuant to 16 U.S.C. § 1273(a)(ii) (7-18-80) 4
Designation of rivers reported in letter from Secretary Andrus to Governor Brown (1-19-81) 6
Declaration of William Hedeman (6-4-81) 12
Declaration of Nancy Nord (6-28-82) 12
Declaration of Gus Speth, filed in *County of Del Norte* v. *Andrus*, No. C 80 3964 WAI (N.D. Cal. 1981) (1-5-81) .. 12
43 Fed. Reg. 55,981 (1978) 12
45 Fed. Reg. 52,459 (1980) 4
45 Fed. Reg. 66,213 (1980) 4
45 Fed. Reg. 70,325 (1980) 4
45 Fed. Reg. 83,031 (1980) 5
2 F. Grad, Treatise on Environmental Law § 9.02, at 9-113 (1980) 7
H. R. Rep. No. 90-1623, 90th Cong., 2d Sess. *reprinted in* 1968 U.S. Code Cong. & Ad. News 3801 3
United States Department of the Interior, Secretarial Issue Document, California Rivers Application, January 16, 1981 17

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in holding that the Secretary of the Interior did not violate regulations promulgated by the Counsel on Environmental Quality ("CEQ") where (a) the Secretary waited longer than the thirty days required by the regulations before designating portions of five northern California rivers as components of the National Wild and Scenic Rivers System, (b) the regulations themselves provide that "trivial" departures from the requirements of the regulations shall not invalidate agency action, (c) there was no finding of bad faith, and (d) neither Plaintiffs nor any other person or public agency suffered injury.

2. Whether the Court of Appeals erred in concluding that the Secretary did not act arbitrarily or capriciously where full review of the administrative record "belies" Plaintiffs' contention that the Secretary failed to consider a factor relevant to his decision to designate the rivers.

3. Whether the Court of Appeals erred in deciding that the Secretary did not abuse his discretion in including the rivers in the National System.

4. Whether the Court of Appeals erred in concluding that no triable issues of fact exist to support Plaintiffs' claim that the final Environmental Impact Statement with respect to the proposed designation was inadequate.

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ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

The Respondents—the Environmental Defense Fund, the Sierra Club, California Trout, Inc., and Save the American River Association—respectfully request the Court to deny the petitions for writs of certiorari, which seek review of the

decision of the United States Court of Appeals for the Ninth Circuit in these cases. The opinion of the Court of Appeals is reported at 732 F.2d 1462 (9th Cir. 1984). The opinion of the Court of Appeals denying the petitions for rehearing is unreported, but is reproduced as Appendix B to the petition for writ of certiorari filed by the Association of California Water Agencies, *et al.*[1]

STATEMENT OF THE CASE

I.

THE NATIONAL WILD AND SCENIC RIVERS ACT

In enacting the National Wild and Scenic Rivers Act of 1968, Congress declared it to be

> "[t]he policy of the United States that certain selected rivers of the Nation which, with their immediate environments, possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values, shall be preserved in free-flowing condition, and that they and their immediate environments shall be protected for the benefit and enjoyment of present and future generations." 16 U.S.C. § 1271.

The purpose of the Act was to complement "the established national policy of dam and other construction at appropriate sections of the rivers of the United States" with "a policy that would preserve other selected rivers or sections thereof in their free-flowing condition to protect the water quality of such rivers and to fulfill other vital national conservation purposes." *Id.*[2]

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[1] Petitioners Association of California Water Agencies, *et al.* are referred to herein as "ACWA Plaintiffs"; Petitioners County of Del Norte, *et al.* are referred to as "Del Norte Plaintiffs." The material contained in the appendix to the petition for writ of certiorari filed by the ACWA Plaintiffs is cited as "ACWA App."; citations to the appendix to the petition for writ of certiorari filed by the Del Norte Plaintiffs are designated "Del Norte App." References to the appendix attached to this brief in opposition are cited as "EDF App."

[2] Thus, the Act prohibits the Federal Energy Regulatory Commission from licensing the construction of any hydroelectric facility on a component river (16 U.S.C. § 1278(c)), withdraws from appropriation all minerals in the federal lands located within one-quarter mile of a component river (*id.* § 1280(a)(iii)), and requires all federal agencies with jurisdiction over lands adjacent to a component river to manage those lands so as "to protect such rivers in accordance with the purposes of [the Act]." *Id.* § 1283(a).

Congress originally designated ten rivers as components of the National Wild and Scenic Rivers System (*id.* § 1274(a)(1)-(10)) and reserved the authority to add other rivers to the system in the future. *Id.* § 1273(a)(i). It also provided that the Secretary of the Interior could include in the National System rivers designated as wild and scenic under state law. *Id.* § 1273(a)(ii). Congress gave the Secretary this authority in order to ensure that state-designated rivers would not be adversely affected by the activities of federal agencies "without the full knowledge and consent of Congress." H.R. Rep. No. 90-1623, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. Code Cong. & Ad. News 3801, 3803; *see* note 2, *supra*. Thus, Section 2(a)(ii) of the Act provides that the Secretary may place rivers in the National System if four conditions are met:

1. The Governor of the State through which the rivers flow requests the Secretary to designate the rivers as components of the National System.

2. The rivers have been "designated as wild, scenic or recreational rivers by or pursuant to an act of the Legislature of the State . . . through which they flow."

3. The Secretary determines that the rivers "are to be permanently administered as wild, scenic or recreational rivers by an agency or political subdivision of the State . . . without expense to the United States."

4. The Secretary finds that the rivers "meet the criteria established in [the Act] and such other criteria supplementary thereto as he may prescribe." 16 U.S.C. § 1273(a)(ii).

The petitions for writs of certiorari question the manner in which the Secretary applied these criteria to the facts of these cases.

II.

GOVERNOR BROWN'S APPLICATION AND SECRETARY ANDRUS' DESIGNATION

On July 18, 1980, California Governor Edmund G. Brown, Jr. asked Secretary of the Interior Cecil D. Andrus to include portions of five Northern California rivers—the Smith, Klamath, Eel, Trinity, and Lower American—in the National Rivers System. EDF App. A. In accordance with Section 2(a)(ii) of the National Wild and Scenic Rivers Act, all of the rivers included in the application are components of the California Wild and Scenic Rivers System, having been designated as such by the California Legislature in 1972. Cal. Pub. Res. Code §§ 5093.54 & 5093.545 (West Supp. 1984).

The Heritage Conservation and Recreation Service of the Department of the Interior ("HCRS") began its evaluation of California's application on July 21, 1980. ACWA App. S. HCRS determined that the proposed designation required an Environmental Impact Statement ("EIS"). Although not required by regulation, HCRS held eight public meetings on the scope of the EIS. 45 Fed. Reg. 52,459 (1980). After reviewing comments submitted by the public and federal agencies, HCRS, with the assistance of various California officials, prepared a draft EIS, which it filed with the Environmental Protection Agency ("EPA") on September 16, 1980. *County of Del Norte* v. *United States,* 732 F.2d 1462, 1465 (9th Cir. 1984).

As part of the public review process on the draft EIS, HCRS conducted ten public meetings in five cities. 45 Fed. Reg. 66,213 (1980). The meetings were widely attended, and a full range of views and criticisms was received and documented. In accordance with Interior Department regulations, HCRS extended the comment period to November 20, 1980, providing a total of sixty-two days for public comment on the draft EIS—seventeen days longer than required by the applicable CEQ regulation, 40 C.F.R. § 1506.10(c). 45 Fed. Reg. 70,325 (1980).

Nevertheless, some of the Del Norte Plaintiffs filed suit, seeking to extend the public comment period even longer. On November 14, 1980, the District Court issued a temporary restraining order, which forbade HCRS to close the comment period on the draft EIS. *Del Norte,* 732 F.2d at 1465. Concluding that it lacked jurisdiction, however, the District Court subsequently dissolved the order on December 1, 1980. *Id.* The comment period, extended eleven days by the TRO, officially closed on that date. HCRS nonetheless accepted and considered additional comments through December 5, which provided a total of seventy-six days for public comment on the draft EIS—thirty-one days more than required by the CEQ regulations. *Id.*

In light of the comments received during the review period, HCRS drafted a final EIS, which it filed with EPA on Friday, December 12, 1980. HCRS also made available to the public that day copies of the final EIS at its offices in San Francisco and Washington, D.C. *Id.* Over the weekend, HCRS began mailing copies of the final EIS to 700 "priority" recipients and completed its distribution on Monday, December 15, 1980. *Id.* Plaintiffs received their copies of the final EIS on Wednesday, December 17. *Id.* On that same date, HCRS published a "notice of availability" in the Federal Register, which stated that the final EIS was available for public inspection at a variety of federal offices. *Id.;* 45 Fed. Reg. 83,031 (1980); Del Norte App. 6.

According to Section 1506.10 of the CEQ regulations, thirty days must elapse between publication of the notice of availability of the final EIS and the Secretary's decision on the proposed designation. 40 C.F.R. § 1506.10. As January 16, 1981 approached, three lawsuits were filed, one by the Del Norte Plaintiffs, which sought to enjoin the Secretary from acting until January 21, 1981 at the earliest. By that date, of course, Secretary Andrus would have been replaced by James Watt, the first Secretary of the Interior for the Reagan Administration. In two of the cases, the District Courts granted temporary relief, restraining Secretary Andrus from acting on California's application. *County of Josephine* v. *Andrus,* No.

CV 81-34 (D. Ore. filed Jan. 15, 1981); *County of Del Norte* v. *Andrus,* No. C 80 3964 WAI (N.D. Cal. filed Jan. 16, 1981); ACWA App. H. On January 19, 1981, the last full day of the Carter Administration, the Court of Appeals vacated these orders, ruling that the District Courts lacked jurisdiction because final agency action had not yet occurred. *County of Josephine* v. *Andrus,* No. 81-3036, and *County of Del Norte* v. *Andrus,* No. 81-4030 (9th Cir. filed Jan. 19, 1981); ACWA App. I.

That same day, Secretary Andrus accepted California's application in part and designated 1,235 river miles as components of the National Wild and Scenic Rivers System.[3] *Del Norte,* 732 F.2d at 1465. In one of his last official acts, Secretary Andrus formally transmitted his decision to Governor Brown in a letter mailed on the morning of January 20, 1981. EDF App. B.

III.

THE LITIGATION

Shortly thereafter, Plaintiffs commenced the present litigation. They claimed that Secretary Andrus' designation of the five California rivers was invalid, because: (1) the Secretary acted prematurely under the CEQ regulations; (2) the Secretary's conclusion that California would be able permanently to administer the rivers was arbitrary and capricious; and (3) the final EIS was inadequate. Respondents were granted leave to intervene in the cases as defendants.

On February 9, 1983, the District Court granted Plaintiffs' motion for summary judgment and invalidated the Secretary's designation of the rivers. ACWA App. D. Defendants appealed this decision, and the Court of Appeals reversed. *County of Del Norte* v. *United States,* 732 F.2d 1462 (9th Cir. 1984).

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[3] Governor Brown had asked the Secretary to include a total of 4,006 river miles in the National System. EDF App. A.

First, the Court of Appeals held that there was no basis for the designation to be set aside under the CEQ regulations. *Id.* at 1464. Plaintiffs had urged that the filing of the final EIS with EPA on Friday, December 12, 1980 was premature, because HCRS did not complete its mailing to the public until Monday, December 15. Section 1506.9 of the CEQ regulations provides that filing may occur no earlier than the EIS is "transmitted to commenting agencies and made available to the public." 40 C.F.R. § 1506.9. In turn, Section 1506.10 states that EPA "shall publish a notice in the Federal Register each week of the environmental impact statements filed during the preceding week." *Id.* § 1506.10(a). Thus, Plaintiffs argued, the earliest date on which the final EIS could be filed with EPA was December 15 (*i.e.*, when distribution was completed), and the notice of availability could be published no earlier than the week of December 22, 1980. Section 1506.10 also provides that agency action based on the final EIS may not occur until at least thirty days after publication. *Id.* § 1506.10(b)(2). Under Plaintiffs' theory, therefore, the Secretary could not have acted until January 21, 1981. Accordingly, Secretary Andrus' designation of the rivers on January 19 was premature by two days.

The Court of Appeals acknowledged Plaintiffs' factual arguments, but concluded that the substantive requirements of the CEQ regulations had been fulfilled. According to the Court, the purpose of Sections 1506.9 and 1506.10

> "[i]s to ensure that all pertinent information is available on proposed action for a period of 30 days before final action is taken, and that interested parties have notice of that availability. This 30-day period is not for the purpose of additional public comment and review, *California* v. *Block*, 690 F.2d 753, 771 (9th Cir. 1982), but, in the words of one commentator, is 'to allow a sufficient review period for the final statement and comments and views of commenting agencies "to accompany the proposal through the existing agency review process."' 2 F. Grad, *Treatise on Environmental Law* § 9.02 at 9-113 (1980) (quoting 42 U.S.C. § 4332(2)(C)). The provision for publication the week following distribution and filing of the EIS is no more than a precautionary measure to ensure the desired result." *Del Norte*, 732 F.2d at 1466.

The Court observed that, by the time the notice of availability appeared in the Federal Register, copies of the final EIS had been distributed to the public and all commenting agencies as required by Section 1506.9. *Id.* at 1465. Indeed, Plaintiffs had *received* their copies by December 17, 1980, the date on which the notice appeared. *Id.* Moreover, the Secretary waited thirty-three days—three days longer than required by Section 1506.10—before taking action on the final EIS. *Id.*

Under these circumstances, the Court concluded, the alleged irregularities in the timing of the filing and publication of the final EIS fell within the scope of Section 1500.3 of the CEQ regulations, which declares "the Council's intention that any trivial violation of these regulations not give rise to any independent cause of action." 40 C.F.R. § 1500.3. For executive action to be struck down under Section 1500.3, the Court held, the alleged violation of the regulations "must have borne some relationship to the decision making process itself." *Del Norte,* 732 F.2d at 1466. Here, the purported violation did not prevent the Secretary from fulfilling his duties under the regulations, for "when the Secretary designated the rivers on January 19, more than the required 30 days following publication had passed." *Id.* at 1465. Nor were Plaintiffs, or anyone else, harmed in any way. As the Court emphasized:

> "The irregularity in filing the notice before circulation . . . had no effect whatsoever on the plaintiffs' opportunity to review the EIS after publication of the notice; nor did it affect the opportunity of the interested agencies and members of the public to review the statement for 30 days following publication." *Id.*[4]

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[4] Throughout this litigation, Plaintiffs have argued that they were "injured" by the allegedly premature filing of the final EIS, because "[h]ad the Notice of Availability been published one week later, in accordance with law, Governor Brown's application would have been referred to Secretary Andrus' successor for action." ACWA Pet. 26. As the Court of Appeals aptly noted,

> "[i]t was, however, in large part the actions of these plaintiffs, in obtaining a temporary restraining order in November, 1980, that made the 'prematurity' significant. The order delayed approval of the EIS for seventeen days before the district court dissolved it for lack of jurisdiction." 732 F.2d at 1466.

Accordingly, because "[t]he integrity of the decision making process and the public's opportunity to comment in accordance with all legal requirements were not compromised in any way," the Court ruled that the District Court had no authority to set aside the Secretary's action. *Id.* at 1466-67.[5] The Court also referred to "the general rule that insubstantial errors in an administrative proceeding that prejudice no one do not require administrative decisions to be set aside." *Id.* at 1467 (citing, *inter alia, Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978)).

Second, the Court of Appeals held that Secretary Andrus did not act arbitrarily or capriciously. The District Court had ruled that, in deciding to include the rivers in the National System, the Secretary did not adequately consider "language from a California Superior Court opinion in a suit by many of these same plaintiffs to enjoin the California Governor from applying for federal designation of the rivers." *Id.* at 1467. In *County of Del Norte* v. *Brown,* No. 292019 (Cal. Super. Ct. Sacramento Co. filed Dec. 5, 1980), Judge Fred W. Marler, Jr. held that he had no power to order Governor Brown to withdraw his application to Secretary Andrus. ACWA App. P, at A-186-A-187. Judge Marler went on to state his opinion, however, that under the California Wild and Scenic Rivers Act as it existed in December 1980, the Governor had no authority

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[5] The Court acknowledged that when the final EIS was filed with EPA on Friday, December 12, 1980, a staff member of HCRS signed a declaration that incorrectly stated that distribution of the EIS had been completed. 732 F.2d at 1467; *see* Del Norte App. 4. In fact, complete distribution was not accomplished until Monday, December 15. 732 F.2d at 1465. Although "mindful and respectful of the district court's concern ... that the false statement itself was a blemish on the decision making process," the Court of Appeals held that the false affidavit was legally irrelevant, because it was not made in bad faith and had no effect on either the Plaintiffs or the Secretary's action. *Id.* at 1467. Indeed, the Court observed that "[o]n appeal, plaintiffs properly have refrained from arguing that the falsity of the declaration has any independent significance." *Id.*

to commit the State permanently to administer the rivers.[6] The Judge acknowledged that it was within the discretion of the Secretary of the Interior to determine whether California could "permanently administer" its rivers within the meaning of Section 2(a)(ii) of the National Wild and Scenic Rivers Act. *Id.* at A-188. He stated, however, that the Secretary—who was not a party to the lawsuit—should decide this question in light of the state court's interpretation of the California Act. *Id.*

In the present cases, the District Court held that this admonition had not been adequately drawn to Secretary Andrus' attention. ACWA App. D, at A-31; 732 F.2d at 1467. The Court of Appeals reversed. It concluded:

> "Full review of the record reveals . . . that the decision was both paraphrased in a memorandum to the Secretary and attached in full as an addendum to that memorandum. The Secretarial Issue Document noted the state court opinion, but concluded that sufficient other state law protections existed to satisfy the permanent administration requirement under the federal act. The record thus belies the contention that the state court opinion was not considered. In the absence of clear evidence to the contrary, courts presume that public officers properly discharge their duties, including reading memoranda addressed to them." *Id.* at 1468.

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[6] At the time Judge Marler issued his memorandum decision, the California Wild and Scenic Rivers Act required the Secretary of the California Resources Agency to "[p]repare a management plan to administer the rivers and their adjacent land areas" and to "[s]ubmit such management plan to the Legislature for its approval." Cal. Pub. Res. Code § 5093.58 (West Supp. 1982); ACWA App. M, at A-108. Judge Marler reasoned that, because the California Legislature had not yet approved a management plan for the rivers included in Governor Brown's application, the California Secretary for Resoruces could not "guarantee to 'permanently administer' the five rivers." ACWA App. P, at A-186. This issue is now moot, however, because the California Legislature amended the state Wild and Scenic Rivers Act in 1982 to eliminate the requirement that a management plan be submitted to and approved by the Legislature. Cal. Stats. 1982, ch. 1481, p.8004, § 10; ACWA App. M, at A-133.

Finally, the Court of Appeals held that there exist no triable issues of fact to support Plaintiffs' claim that the final EIS was inadequate. ACWA App. B. Accordingly, the Court reversed the judgment of the District Court and ordered the cases remanded for entry of judgment in favor of Defendants. 732 F.2d at 1468.

REASONS WHY THE WRITS SHOULD BE DENIED

The petitions for writs of certiorari are long on rhetoric,[7] but short on explanation why this Court should review the decision of the Court of Appeals. In fact, there is no reason for the Court to exercise its discretionary jurisdiction, for the Court of Appeals' decision involves nothing more than the application of well-settled principles of administrative law to a complex set of facts.

I.

THE COURT OF APPEALS' PROPER DEFERENCE TO THE CEQ'S INTERPRETATION OF ITS OWN REGULATIONS DOES NOT MERIT REVIEW BY THIS COURT.

The Court of Appeals held that the District Court erred in setting aside the Secretary's designation of the rivers as premature under the CEQ regulations, because the District Court's action was inconsistent with the Council's own admonition that "any trivial violation of these regulations not give rise to any independent cause of action." 40 C.F.R. § 1500.3, *discussed in Del Norte,* 732 F.2d at 1466. This decision involves no issue of statutory interpretation. Rather, the Court simply applied the CEQ's interpretation of its own regulations to the procedures followed by HCRS and EPA in filing and publishing the final EIS.

As the Court of Appeals observed, the purpose of the "trivial violation" rule was to make clear the Council's intention that " 'trivial departures from the requirements established by the Council's regulations' " not "result in judicial invalidation

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[7] *See, e.g.,* Del Norte Pet. 23: "This case presents a serious attack on our system of government."

of agency actions." 732 F.2d at 1466 (quoting National Environmental Policy Act—Regulations: Comments and the Council's Response, 43 Fed. Reg. 55,981 (1978)). The Court concluded that this admonition must mean that "[a]ny violation which in the end requires the agency action to be set aside must have borne some relationship to the decision making process." *Id.* Because all of the substantive requirements of the regulations had been fulfilled—the EIS had been distributed to the public and all commenting agencies by the time the notice of availability appeared in the Federal Register, and the Secretary waited more than thirty days before acting on the final EIS—the Court of Appeals held that the "irregularities" in the filing and distribution of the EIS were "trivial" and therefore nonactionable under Section 1500.3. *Id.*

Thus, as required by *Andrus* v. *Sierra Club*, 442 U.S. 347, 358 (1979), and other cases,[8] the Court of Appeals properly deferred to the CEQ's interpretation of its own regulations. Indeed, the Court had before it declarations from the Director of the Office of Federal Activities of EPA and the Chairman of the CEQ under the Carter Administration and an affidavit from the General Counsel of the CEQ under the Reagan Administration, which stated that the procedure followed by HCRS and EPA in these cases was a well-established administrative practice and fully satisfied the public review and comment requirements of Sections 1506.9 and 1506.10. EDF App. C-E.

The Court of Appeals' decision involves nothing more significant than judicial deference to the CEQ's interpretation of its own regulations. This deference accords with the decisions of this Court and other federal courts cited above. Accordingly, there are no "special or important reasons" for this Court to review the Court of Appeals' decision.

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[8] *See, e.g., Sierra Club* v. *Sigler*, 695 F.2d 957, 972 (5th Cir. 1983) (CEQ's interpretation of its own regulations "are binding on this court and agencies preparing EIS's"); *Pacific Coast Medical Enterprises* v. *Harris*, 633 F.2d 123, 131 (9th Cir. 1980) (agency's construction of one of its own regulations must "be affirmed if it is not clearly erroneous or inconsistent with the regulation").

II.

THE COURT OF APPEALS CORRECTLY APPLIED THE DECISIONS OF THIS COURT IN CONCLUDING THAT THE SECRETARY DID NOT ACT ARBITRARILY OR CAPRICIOUSLY.

The Court of Appeals' conclusion that Secretary Andrus did not act arbitrarily or capriciously similarly does not warrant review by this Court. Plaintiffs alleged, and the District Court held, that dictum in a California Superior Court opinion—that California would not be able permanently to administer the rivers—was not adequately drawn to the Secretary's attention. *See* pp. 9-10, *supra*. As the Court of Appeals pointed out, "[f]ull review of the record reveals, however, that the decision was both paraphrased in a memorandum to the Secretary and attached in full as an addendum to that memorandum." *Del Norte,* 732 F.2d at 1468. The Court concluded that "[t]he record thus belies the contention that the state court opinion was not considered." *Id.*

There is no reason for this Court to grant certiorari simply to review this decision. The Court of Appeals correctly found that, before making his designation decision, the Secretary considered the state court's admonition that California would not be able permanently to administer the rivers until the Legislature had approved a management plan for them. As the Court noted, not only was the state court's opinion paraphrased in the Secretarial Issue Document ("SID"), but the entire text of the opinion was attached as an addendum to the SID. *Id.* at 1468; *see* Del Norte App. 1, at A-7. Indeed, in his letter to Governor Brown, Secretary Andrus made clear his understanding that the California Legislature had not yet approved a river management plan. The Secretary stated that "California has fulfilled the requirements of Section 2(a)(ii) of the Act by designating the rivers under the California Wild and Scenic Rivers Act and by adopting a program of action which is adequately protecting the river environments from adverse state and local actions." EDF App. B. He encouraged the Governor, however, "in completing formal management plans for the rivers and in having them adopted by the State Legislature. These would serve to focus attention on the state's protective

program and would provide additional details of land use regulation and resource administration." *Id.*

Thus, the administrative record abundantly supports the Court of Appeals' conclusion that the Secretary considered the state court's interpretation of Section 2(a)(ii) of the National Rivers Act. The Court of Appeals applied the correct legal standard to its review of the record.[9] Accordingly, there is no reason for this Court to review the Court of Appeals' review of the administrative record.

III.

THERE IS NO REASON FOR THIS COURT TO REVIEW THE SECRETARY'S DISCRETIONARY DECISION TO DESIGNATE THE RIVERS.

Plaintiffs also claim that the Secretary's inclusion of the rivers in the National System was an abuse of his discretion, because the California Legislature had not yet approved a management plan for the rivers. According to Plaintiffs, this fact is of twofold significance. First, Plaintiffs argue that until the Legislature approves a management plan, the rivers are not "designated" wild and scenic under California law as required by Section 2(a)(ii) of the National Rivers Act. ACWA Pet. 14-16; Del Norte Pet. 11-13; *see* p. 3, *supra*. Second, Plaintiffs urge that in the absence of a management plan the Secretary was required to find that California would not be able permanently to administer the rivers. ACWA Pet. 13-15; Del Norte Pet. 16-18. Plaintiffs raised this claim only on petition for rehearing (*see* ACWA App. C., at A-14-A-19), which the Court of Appeals denied. ACWA App. B.

Contrary to Plaintiffs' assertions, the National Wild and Scenic Rivers Act contains no requirement that the state legislature approve a management plan for the rivers, and the

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[9] *See Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 415 (1971) ("court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error in judgement"); *cf. Motor Vehicle Manufacturers Association* v. *State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 103 S. Ct. 2856, 2867 (1983) ("agency rule would be arbitrary and capricious if the agency has . . . entirely failed to consider an important aspect of the problem").

California Wild and Scenic Rivers Act makes no mention of "permanent administration."[10] As the language of Section 2(a)(ii) of the National Act makes clear, the sole purpose of the permanent administration requirement is to ensure that the State will be able permanently to administer the rivers "without expense to the United States other than for administration and management of federally owned lands." 16 U.S.C. § 1273(a)(ii). The permanent administration element of the federal statute thus has nothing to do with the management plan requirement of the California statute.

With this understanding of the two Acts in mind, it is clear that Plaintiffs' claim does not merit review by this Court. First, the issue raised by Plaintiffs is relevant only to the facts of these cases. Plaintiffs have not identified any other state that requires its legislature to approve a management plan for rivers it has designated as wild and scenic; nor are we aware of any such state. Moreover, management plans are no longer necessary even in California, for in 1982 the State Legislature amended the California Wild and Scenic Rivers Act to eliminate that requirement. Cal. Stats. 1982, ch. 1481, p.8004, § 10; ACWA App. M, at A-133. Thus, there is no reason to believe that the issue whether the Secretary may include rivers in the National Rivers System for which the state legislature had not yet approved a management plan will arise in any future case.

Second, there is no conflict between Secretary Andrus' designation of the rivers and California law. Plaintiffs urge that the rivers had not been "designated" by the California Legislature as required by Section 2(a)(ii) of the National Act, because the Legislature had not yet approved a management plan. This argument is contrary to the language of the

[10] The ACWA Plaintiffs' statement that the California Legislature "required that, before he could 'permanently administer' the system," the California Secretary for Resources must prepare a management plan for the rivers and submit the plan to the Legislature (ACWA Pet. 17) is a misleading mischaracterization of the California Act. The statute quoted by Plaintiffs, Cal. Pub. Res. Code § 5093.58 (West Supp. 1982), which has now been repealed, did not use the term "permanent administration." *See* ACWA App. L, at A-108. Rather, the permanent administration requirement is solely a matter of federal law, designed to ensure that when the Secretary of the Interior accepts state-designated rivers into the National Rivers System, the United States will not bear any of the cost of their administration. 16 U.S.C. § 1273(a)(ii).

California Wild and Scenic Rivers Act. Section 5093.54 of the Act, which was enacted in 1972, declares that "[t]he following rivers are *designated* as components of the system" and then names the Klamath, Trinity, Smith, Eel, and American Rivers. ACWA App. L, at A-105-A-107 (emphasis added). Thus, the rivers clearly had been "designated as wild, scenic or recreational rivers by or pursuant to an act of the Legislature" as required by Section 2(a)(ii) of the National Act. 16 U.S.C. § 1273(a)(ii).[11]

Plaintiffs also argue that the Secretary had no authority to include the rivers in the National System, because without a management plan approved by the California Legislature the State would not be able permanently to administer the rivers. This argument misapprehends the purpose of the "permanent administration" requirement. Section 2(a)(ii) directs the Secretary to determine that the State can permanently administer the rivers as wild, scenic, or recreational *without expense to the United States*. As the statutory language makes clear, Congress sought to ensure that the State, not the United States, would pay the costs of administering the rivers as components of the state and national rivers systems. The statute reveals no congressional interest, however, in determining *how* the State would go about this task—for example, whether the State would administer the rivers through its Resources Agency or pursuant to a management plan approved by the State Legislature. Thus, the failure of the Legislature to approve a

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[11] Plaintiffs contend that Section 5093.54 does not "designate" the Eel River, because it provides that "after an initial period of 12 years following the effective date of this chapter, the Department of Water Resources shall report to the Legislature as to the need for water supply and flood control projects on the Eel River and its tributaries, and the Legislature shall hold public hearings to determine whether legislation should be enacted *to delete* any segment of the river from the system." Cal. Pub. Res. Code § 5093.54(d) (emphasis added); ACWA App. L, at A-106-A-107; *see* ACWA Pet. 14-16. This argument is contradicted by the terms of the statute, which "designates" the Eel and its tributaries as components of the state system, while simply committing the Legislature in 1984 to review this designation and to determine whether "to delete all or any segment of the river from the system." Indeed, the opinion of the California Superior Court on which Plaintiffs rely so heavily in support of their argument about permanent administration, *County of Del Norte* v. *Brown*, No. 272019 (Cal. Super. Ct. Sacramento Co. filed Dec. 5, 1980), confirms that "[t]he Eel River is currently designated as a component of the California System." ACWA App. P., at A-187.

management plan was irrelevant to the Secretary's decision whether California could permanently administer the rivers without expense to the United States. Conversely, the Secretary's inclusion of the rivers in the National System in no way altered the duty of the California Secretary for Resources to submit a management plan to the Legislature (a duty which no longer exists).

Third, Secretary Andrus' decision that, even without a formal management plan, California would be able permanently to administer the rivers was a policy determination within the Secretary's broad discretionary authority. Last Term, this Court confirmed the long-established principle that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer," particularly where the action taken by the department "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by statute." *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 104 S. Ct. 2778, 2782, 2783 (1984). The administrative record in these cases makes clear that Secretary Andrus carefully considered whether the absence of a management plan would disable the State from permanently administering the rivers without expense to the United States. The Secretary reviewed the laws of California and the State's eight-year experience in managing the rivers and concluded that "California has fulfilled the requirements of Section 2(a)(ii) of the [National] Act by designating the rivers under the California Wild and Scenic Rivers Act and by adopting a program of action which is adequately protecting the river environments from adverse State and local actions." EDF App. B.[12] Inasmuch as the Court of Appeals properly deferred to the

[12] The Secretarial Issue Document further explicates the Department's consideration of this question:

> "The California Wild and Scenic Rivers Act requires that the Resources Agency develop management plans for the rivers and submit them to the State legislature for approval. No river has an approved management plan to date, and this has raised serious questions (a major point in lawsuits against the Federal and State governments) as to whether there is assurance that the rivers will be "permanently administered" by the State. Nevertheless, the State has asserted that considerable protection is afforded these rivers where they flow across State and private lands. After review of applicable California legal authorities and existing management practices, a finding has been made that the State has

Secretary's discretionary determination that California could permanently administer the rivers, there is no reason for this Court to review the decision upholding the Secretary's action.[13]

IV.

THIS COURT SHOULD NOT REVIEW THE COURT OF APPEALS' DECISION THAT NO TRIABLE ISSUES OF FACT EXIST TO SUPPORT PLAINTIFFS' CLAIM THAT THE FINAL EIS WAS INADEQUATE.

Plaintiffs' last request is for this Court to review the Court of Appeals' determination that there exist no triable issues of fact to support Plaintiffs' claim that the final EIS was inadequate. This claim involves no issue significant to the administration of NEPA generally. *Cf. Andrus* v. *Sierra Club,* 442 U.S. 347 (1979) (whether federal agencies are required to prepare EIS's to accompany appropriation requests); *Kleppe* v. *Sierra Club,* 427 U.S. 390 (1976) (whether approval of numerous individual coal development projects in Northern Great Plains area required preparation of an EIS for entire region). Rather, the sole question presented is whether the Court of Appeals erred in reviewing the administrative record,

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(Footnote continued from previous page)

provided the required commitment to permanently administer the rivers, has demonstrated a present ability to accomplish this end through an existing administrative framework, and has the necessary legal authority to achieve such protection." United States Department of the Interior, Secretarial Issue Document, California Rivers Application, Jan. 16, 1981; Del Norte App. 1, at A-11-A-12.

[13] Plaintiffs also raise for the first time a claim that the Secretary's designation of the rivers violates the Tenth Amendment. ACWA Pet. 18-21; Del Norte Pet. 15-16. Plaintiffs did not allege this claim in their complaints, nor did they argue the claim before either the District Court or the Court of Appeals. Under these circumstances, they may not present their contentions to this Court. *FTC* v. *Grolier, Inc.,* 462 U.S. 19, 103 S. Ct. 2209, 2212 n.6 (1983); *Rogers* v. *Lodge,* 458 U.S. 613, 628 n.10 (1982); *United States* v. *Lovasco,* 431 U.S. 783, 788 n.7 (1977).

together with the final EIS, and concluding that the EIS was not inadequate.[14] This Court should not expend its limited time adjudicating the adequacy of a single EIS for a specific project that is of no possible relevance to any other federal action.

CONCLUSION

For the reasons set forth above, the petitions for writs of certiorari should be denied.

DATED: December 4, 1984.

Respectfully submitted,

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[14] The Court of Appeals' task was extremely limited. In reviewing the adequacy of an EIS, " '[t]he only role for a court is to insure that the agency has taken a "hard look" at the environmental consequences.' " *Strycker's Bay Neighborhood Council, Inc.* v. *Karlen*, 444 U.S. 223, 228 (1980) (per curiam) (quoting *Kleppe* v. *Sierra Club*, 427 U.S. 390, 410 n.21 (1976)). The courts commonly resolve this question by summary adjudication based on a review of the administrative record. *See, e.g., Strycker's Bay, supra; Conservation Law Foundation of New England, Inc.* v. *GSA*, 707 F.2d 626 (1st Cir. 1983); *Sierra Club* v. *Sigler*, 695 F.2d 957 (5th Cir. 1983); *Izaak Walton League of America* v. *Marsh*, 655 F.2d 346 (D.C. Cir.), *cert. denied*, 454 U.S. 1092 (1981); *Coalition For Canyon Preservation* v. *Bowers*, 632 F.2d 774 (9th Cir. 1980).

APPENDIX

Page

A. Application from Governor Brown to Secretary Andrus pursuant to 16 U.S.C. § 1273(a)(ii) (7-18-80) C.R. 44 ..... A-1

B. Designation of rivers reported in letter from Secretary Andrus to Governor Brown (1-19-81) C.R. 44 A-4

C. Declaration of William Hedeman (6-4-84) C.R. 16A & 49 ..... A-6

D. Declaration of Gus Speth, filed in *County of Del Norte* v. *Andrus*, No. C 80 3964 WAI (N.D. Cal. 1981) (1-15-81) A-10

E. Declaration of Nancy Nord (6-28-82) C.R. 79 .....A-13

APPENDIX A

State of California
GOVERNOR'S OFFICE
SACRAMENTO 95814

EDMUND G. BROWN JR. 916/445-2843

July 18, 1980

The Honorable Cecil D. Andrus
Secretary of the Interior
Interior Building, Room 6151
Washington, D.C. 20240

Dear Secretary Andrus:

Some of the nation's most striking rivers still flow freely through the rugged mountains of Northern California to the sea. These productive rivers and their watersheds are the base of Northern California's economy. They are a stirring symbol of the force and beauty of the natural world as well.

The Legislature of the State of California has designated certain rivers as components of the California Wild and Scenic Rivers System (Public Resources Code Sections 5093.50-5093.64). I also believe that these designated rivers should remain undeveloped; therefore, in accordance with Section 2(a)(ii) of the Wild and Scenic Rivers Act, Public Law 90-542 (16 U.S.C., 1271 et seq.), I do hereby request on behalf of the State of California that the following rivers be designated National Wild and Scenic Rivers:

(a) *Klamath River.* The main stem from 100 yards below Iron Gate Dam to the Pacific Ocean; the Scott River from the mouth of Shackleford Creek west of Fort Jones to the river mouth near Hamburg; the Salmon River from Cecilville Bridge to the river mouth near Somesbar; the North Fork of the Salmon River from the intersection of the river with the south boundary of the Marble Mountain Wilderness Area to the river mouth; Wooley Creek, from

the western boundary of the Marble Mountain Wilderness Area to its confluence with the Salmon River.

(b) *Trinity River.* The main stem from 100 yards below Louiston Dam to the river mouth at Weitchpac; the North Fork of the Trinity from the intersection of the river with the southern boundary of the Salmon-Trinity Primitive Area downstream to the river mouth at Helena; New River from the intersection of the river with the Southern Boundary of the Salmon Trinity Primitive Area downstream to the river mouth near Burnt Ranch; South Fork of the Trinity from the junction of the river with State Highway 36 to the river mouth near Salver.

(c) *Smith River.* All its tributaries from the Oregon-California state boundary to the Pacific Ocean.

(d) *Eel River.* The main stem from 100 yards below Van Arsdale Dam to the Pacific Ocean; the South Fork of the Eel from the mouth of Section Four Creek near Branscomb to the river mouth below Weott; Middle Fork of the Eel from the intersection of the river with the southern boundary of the Middle Eel-Yolla Bolly Wilderness Area to the river mouth at Dos Rios; North Fork of the Eel from the Old Gilman Ranch downstream to the river mouth near Ramsey; Van Duzen River from Dinsmores Bridge downstream to the river mouth near Fortuna.

(e) *American River.* The Lower American from Nimbus Dam to its junction with the Sacramento River.

These rivers will be administered permanently as wild, scenic, or recreational rivers by the Resources Agency, or one of its constituent departments, without expense to the United States other than for the administration and management of federally-owned lands. A partial list of the State's Statutory authority for permanently administering the rivers is attached as Appendix A.

We believe that each of these rivers meets the criteria established in federal statute for inclusion in the National Wild and Scenic Rivers System.

Therefore, I respectfully request that you consider and approve California's application to include the named rivers into the National System.

Sincerely,

EDMUND G. BROWN JR.
Governor

APPENDIX B

EXHIBIT "47"

United States Department of the Interior

Office of the Secretary
Washington, D.C. 20240

January 19, 1981

Honorable Edmund G. Brown, Jr.
Governor of California
Sacramento, California

Dear Jerry:

I am pleased to advise you that favorable action has been taken on your request that five California rivers be designated as components of the National Wild and Scenic Rivers System as provided for in Section 2(a)(ii) of the Wild and Scenic Rivers Act, P. L. 90-542, as amended. The specific segments designated are identified in the enclosed Notice. Although we were not able to designate all 4,000+ miles included in your application, we believe the approximately 1,235 miles designated go a long way toward protecting the essential values of the rivers from adverse Federal actions. I note with pleasure that California now has passed my State of Idaho in numbers and miles of rivers in the National Wild and Scenic Rivers System and in this regard is second in the Nation only to the State of Alaska. This is the most significant use of Section 2(a)(ii) of the Federal Wild and Scenic Rivers Act since its passage in 1968 and serves to demonstrate that protection of natural resource values of the Nation's rivers does indeed involve a Federal/State partnership.

California has fulfilled the requirements of Section 2(a)(ii) of the Act by designating the rivers under the California Wild and Scenic Rivers Act and by adopting a program of action which is adequately protecting the river environments from adverse State and local actions. We encourage you in completing formal management plans for the rivers and in having them adopted by the State legislature. These would

serve to focus attention on the State's protective program and would provide additional details of land use regulation and resource administration.

With regard to the smaller tributaries of the Smith River which were not deemed eligible for the National System, but which California chose to put into its State system, we recognize that the high water quality of those tributaries is essential to maintaining the outstandingly remarkable anadromous fishery resource of the river system. We expect that the State and the U.S. Forest Service will take all necessary steps to sustain and possibly improve their present quality.

Finally, I want to compliment all the personnel in your resources agency who have worked so diligently to make these designations possible. They have worked with the spirit and determination that only true dedication to a cause can elicit. You have every right to be proud of them.

Sincerely,

CECIL D. ANDRUS

Enclosure

cc:
Secy's Files
Secy's RF (2)
AS/FW; LW
Ron Way (FW)
Solicitor
OPA
CL
HCRS
John Haubert (HCRS)

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APPENDIX C

ORIGINAL
FILED
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ASSOCIATION OF CALIFORNIA WATER AGENCIES, *et al.*, *Plaintiffs* v. THE UNITED STATES OF AMERICA, *et al.*, *Defendants*	**Civil Action No. C-81-1457-WAI DECLARATION OF WILLIAM HEDEMAN**

I, William Hedeman, do hereby declare and testify:

(1) I am the Director of the United States Environmental Protection Agency's (EPA) Office of Federal Activities. I have served in this capacity since January, 1979.

(2) The Office of Federal Activities is responsible for receiving all environmental impact statements (EISs) filed with EPA pursuant to 40 C.F.R. § 1506.9 and filing Notices of Availability of such EISs pursuant to 40 C.F.R. § 1506.10(a).

(3) Pursuant to 40 C.F.R. § 1506.10(a), the Office of Federal Activities has established an administrative practice which applies when the filing agency cannot meet the normal deadlines EPA has set for its own internal management needs. Our normal practice is that an EIS be filed and distributed on the last day of the work week before the work week in which the Notice of Availability is published in the *Federal Register*. When the filing agency cannot follow our normal practice we allow for the publication of a *Federal Register* Notice of Availability of an EIS during the same week copies of that EIS are distributed to the public and delivered in printed form to EPA. This practice will be followed only if a working copy of the EIS is made available to EPA by the last day of the prior work week, and if copies are distributed to the public and a printed copy is delivered to EPA by the time the Notice of Availability is published in the *Federal Register*. A working copy is required so that EPA will have the information necessary to develop an Agency abstract of the EIS. This abstract is used for purposes of publishing the *Federal Register* Notice. When these conditions are satisfied, EPA treats the EIS as having been filed in accordance with 40 C.F.R. 1506.9 on the date the working copy was delivered to EPA.

(4) This practice has been established to provide administrative flexibility in the implementation of the requirements of section 1506.10(a) while satisfying the intent of section 1506.9 that the EIS be available for review at the time the Notice of Availability is published in the *Federal Register*.

(5) This adminsitrative practice has been followed in the following instances:

Agency	EIS Status	Project	Date Arrangement Made with EPA
Corps of Engineers	Final	Permit-Prudhoe Bay-Water Flood Project, Alaska	10/9/80
Nuclear Regulatory Commission (NRC)	Final	Primary Cooling System-Chemical Decontamination at Dresden Nuclear Power Station, Unit #1	10/20/80
Air Force	Draft	Consolidated Space Operation Center	10/24/80
EPA	Final	201 Project for Santa Fe, New Mexico	10/24/80
Bureau of Land Management	Draft	E.P.S.I. Coal-Slurry Pipeline Project	10/29/80
NRC	Draft Supplement	Virgil C. Summer, Unit #1 Fairfield County, South Carolina	11/6/80
Office of Surface Mining (OSM)	Final	Alton Mine, Utah, Section 522 Determination	11/12/80
Fish and Wildlife Service	Final	Trinity River Project	11/25/80
HCRS	Final	Pinelands Reserve, New Jersey	12/3/80
Federal Energy Regulatory Commission (FERC)	Draft Supplement	Small Power Production and Co-Generation Facilities	12/4/80
HCRS	Final	California Wild and Scenic Rivers Proposal	12/10/80

Agency	EIS Status	Project	Date Arrangement Made with EPA
OSM	Final	Rojo-Caballos Mine Reclamation Plan	1/27/81
FERC	Final	Sulton River Project	2/27/81
National Oceanic and Atmospheric Administration	Draft	Deep Sea Bed Mining Program	3/12/81
FERC	Final	Small Power Production and Co-Generation Facilities	2/17/81 (approximate)

This list may not cover all instances for which this practice has been followed.

(6) Working copies of the FEIS entitled *Proposed Designation of Five California Rivers in the National Wild and Scenic Rivers System* were provided to EPA on Friday, December 12, 1980. Printed copies were delivered to EPA by Wednesday, December 17, 1980.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed at Washington, D.C. on June 3, 1981.

WILLIAM HEDEMAN

APPENDIX D

G. WILLIAM HUNTER
United States Attorney

CHARLES M. O'CONNOR
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UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

COUNTY OF DEL NORTE, *et al.*, *Plaintiffs* vs. CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, *et al.*, *Defendants* STATE OF CALIFORNIA, *Intervenor*	**CIVIL No. C-80-3964 W.A.I. DECLARATION OF GUS SPETH**

GUS SPETH declares as follows:

(1) I am Chairman of the President's Council on Environmental Quality (CEQ). The Council is comprised of three members, including myself. As Chairman, I am principally responsible for administering the activities of the Council and staff. I have served in this capacity since July 1, 1979. Between March, 1977 and July 1, 1979, I served as a member of the Council.

(2) The CEQ was created by Title II of the National Environmental Policy Act of 1969 (NEPA). Under NEPA, the Council is located in the Executive Office of the President and is charged with overseeing the efforts of federal agencies to comply with the requirements of this law.

(3) On May 24, 1977, President Carter issued Executive Order 11911, which directed the Council to issue regulations implementing the procedural provisions of NEPA. The Executive Order directed that the NEPA regulations be designed to make the environmental impact statement (EIS) process more useful to decisionmakers and the public, and to reduce paper work and the accumulation of extraneous background data in order to focus on real environmental issues and alternatives. The Council's NEPA regulations were published in the *Federal Register* on November 29, 1978 (43 Fed. Reg. 55798-56007) and became effective eight months later on July 30, 1979. Shortly before the effective date of the NEPA regulations, the Supreme Court relied on the regulations in interpreting NEPA, saying "CEQ's interpretation of NEPA is entitled to substantial deference" and describing the preparatoin of the NEPA regulations as a "detailed and comprehensive process ordered by the President of transforming advisory guidelines into mandatory regulations applicable to all federal agencies." *Andrus* v. *Sierra Club,* 442 U.S. 347 (1979).

(4) The purpose of 40 C.F.R. § 1506.9, taken in conjunction with § 1506.10(b)(2), is to ensure that agencies and the public actually have 30 days for reviewing final EIS's, measured from the time the Environmental Protection Agency (EPA) publishes an EIS notice in the *Federal Register.* No longer period for public review is intended, except as specifically authorized by 40 C.F.R. § 1506.10(d).

(5) The purpose of 40 C.F.R. §§ 1506.9 and 1506.10(b)(2) would be satisfied if a final EIS is available

for public review for 30 days following publication of a *Federal Register* EIS notice.

(6) The first sentence in § 1506.10(a) is intended to facilitate the administrative convenience of EPA and provide EPA with adequate time to carry out its responsibilities for publishing a *Federal Register* notice of the filing of an EIS. The phrase "preceding week" used in the first sentence of 1506.10(a) is not intended to prevent EPA from publishing a notice in the *Federal Register* for an EIS filed with EPA during the same week the notice appears in the *Federal Register*. The phrase "preceding week" used in the first sentence of 1506.10(a) is not intended to enlarge the period of time provided under 1506.10(b)(2) for public and agency review of final EIS's.

(7) For these reasons, if the public and the agencies have actually been provided with thirty days to review and comment on the final EIS as required by § 1506.10(b)(2), failure to make complete delivery of the final EIS to the agencies and the public during the period preceding publication of the *Federal Register* notice is not a violation of the public review and comment requirements in the NEPA regulations and is, at most, a "trivial violation" of the second sentence in § 1506.9 within the meaning of 40 C.F.R. 1500.3.

Executed this 13 day of January, 1981, in Washington, D.C. I declare under penalty of perjury that the foregoing is true and correct.

GUS SPETH

APPENDIX G

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**IN THE
UNITED STATES DISTRICT
COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA**

COUNTY OF DEL NORTE, *et al.*, *Plaintiffs* vs. THE UNITED STATES OF AMERICA, *et al.*, *Defendants* STATE OF CALIFORNIA *Intervenor*	**CIVIL No. C-81-0567-W.A.I.**
And ASSOCIATION OF CALIFORNIA WATER AGENCIES, *et al.*, *Plaintiffs* vs. THE UNITED STATES OF AMERICA, *et al.*, *Defendants* STATE OF CALIFORNIA, *Intervenor*	**CIVIL No. C-81-1457-W.A.I.**

DECLARATION OF NANCY NORD

NANCY NORD declares as follows:

(1) I am General Counsel of the President's Council on Environmental Quality (CEQ) and have served in this capacity since May 18, 1981. I am familiar with the regulations at 40 C.F.R. 1500 *et seq.* promulgated by CEQ on November 29, 1978.

(2) The purpose of 40 C.F.R. § 1506.9, taken in conjunction with § 1506.10(b)(2), is to ensure that agencies and the public actually have 30 days for reviewing final environmental impact statements (EIS's), measured from the time the Environmental Protection Agency (EPA) publishes an EIS notice in the *Federal Register*.

(3) The purpose of 40 C.F.R. §§ 1506.9 and 1506.10(b)(2) would be satisfied if a final EIS is available for public review for 30 days following publication of a *Federal Register* EIS notice.

(4) The first sentence in § 1506.10(a) is to provide EPA with adequate time to carry out its responsibillites for publishing a *Federal Register* notice of the filing of an EIS. The phrase "preceding week" used in the first sentence of 1506.10(a) is not intended to prevent EPA from publishing a notice in the *Federal Register* for an EIS filed with EPA during the same week the notice appears in the *Federal Register*. The phrase "preceding week" used in the first sentence of 1506.10(a) is not intended to enlarge the period of time provided under 1506.10(b)(2) for public and agency review of final EIS's.

(5) The purpose of the public review and comment requirements have been met if the public and the agencies have been provided with 30 days to review and comment on the final EIS. Failure to make complete delivery of the final EIS to the agencies and the public as set out in 40 C.F.R. 1506.9 if such failure does not result in the public and the agencies having less than 30 days to review and comment on the Final EIS is merely a "trivial violation" of § 1506.9 and is within the meaning of 40 C.F.R. 1500.3.

Executed this 23 day of June, 1982, in Washington, D.C. I declare under penalty of perjury that the foregoing is true and correct.

NANCY NORD

District of Columbia):
Subscribed and sworn to before me this 23rd day of June 1982

No. 84-544

Office-Supreme Court, U.S.
FILED
JAN 4 1985
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1984

ASSOCIATION OF CALIFORNIA WATER AGENCIES, et al.,

Petitioners,

vs.

THE UNITED STATES OF AMERICA, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF TO BRIEF FOR THE UNITED STATES IN OPPOSITION

(Supreme Court Rules, Rule 22.5)

KRONICK, MOSKOVITZ, TIEDEMANN
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THE UNITED STATES HAS ERRONEOUSLY CHARACTERIZED THE STATE COURT'S INTERPRETATION OF STATE LAW AS "DICTUM"

In its brief in opposition to the petitions for a writ of certiorari the United States has misrepresented Sacramento County Superior Court Judge Fred W. Marler, Jr.'s declaration of state law as mere "dictum," when in fact it was the decision in the case. In its brief, the United States has virtually paraphrased the language which was used by the Department of the Interior's attorneys in 1980 and 1981, in their perfunctory reports to the Secretary of the Interior on the effect of the state court's ruling. (Br. for the U.S. in Opp., p. 5.) The Department's attorneys' advice to the Secretary that Judge Marler's decision was mere dictum, may well have been the cause of the Secretary's erroneous interpretation of State law. The United States' brief should not mislead this Court

in the same manner as the Secretary was misled.

Petitioners Association of California Water Agencies, et al., sued Governor Brown in the California Superior Court seeking both declaratory and injunctive relief. While Judge Marler denied the injunction, he issued a decision and judgment declaring the California law. In his Memorandum Decision, Judge Marler stated:

> The conclusion the Court reaches as to the statutory construction of California law is that the present state of law and fact in California is such that the Secretary of Resources cannot guarantee to "permanently administer" the five rivers designated by statute.
>
> * * *
>
> While the Governor claims that the California Act confers permanent administration authority over the System to the Resources Secretary, this Court can apply its own interpretation of the Act. Having done so, it is then the province of the Secretary of the Interior to find in accordance with the Court's interpretations of the California Act whether federal requirements for inclusion of

> these rivers in the national system have been met.

(Appx. to Ptn. for Writ of Certiorari, pp. A-186, A-187.)

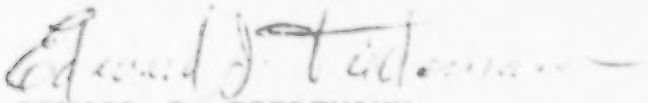
A state court's interpretations of state law in a declaratory relief action cannot properly be characterized as "dictum." When his attorneys told him that the State Court's interpretation of State law was mere dictum, the Secretary of the Interior was misguided, which is probably why the District Court judge determined o send this matter back to the Secretary for reconsideration.

We ask that this Court not succumb to the same erroneous mischaracterization of Judge Marler's decision as "dictum."

Dated: January 3, 1985.

Respectfully submitted,

KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
A Professional Corporation
EDWARD J. TIEDEMANN
ROBIN LESLIE STEWART



EDWARD J. TIEDEMANN
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PROOF OF SERVICE BY MAIL

I, CONNIE M. BECKES, declare as follows:

I am a citizen of the United States and am employed in the County of Sacramento, State of California, where the mailing described herein occurred. I am over the age of eighteen and not a party to this action. My business address is 770 L Street, Suite 1200, Sacramento, CA 95814-3363.

On January 3, 1985, I served by mail a copy of the foregoing document by placing three copies thereof in sealed envelopes with first-class postage fully prepaid in the United States Post Office mail box at Sacramento, California, addressed as follows:

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Executed on January 3, 1985, at Sacramento, California. I declare under penalty of perjury that the foregoing is true and correct.

Connie M. Beckes
Connie M. Beckes